Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

BRUCE LAVINE, as next friend of JAMES LAVINE,

Petitioner

v.

BLAINE SCHOOL DISTRICT, a municipal corporation, TIM HANEY, DAN NEWELL, KAREN MULHOLLAND,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a school violates the First Amendment by expelling a student for writing a poem with violent imagery and sharing it with a teacher — without disrupting school activities or threatening anyone — when less restrictive alternatives would have adequately protected the school's interests.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is published at 247 F.3d 981 (9th Cir. 2001). A copy of the opinion is included as Appendix A. The denial of en banc review, and the dissents to the denial of en banc review by Judges Reinhardt, Kozinski, and Kleinfeld, are published at 279 F.3d 719 (9th Cir. 2002). A copy is included as Appendix B. The District Court's opinion is unpublished and is included as Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals denied en banc review on January 29, 2002. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."
U. S. CONST. amend I.

STATEMENT OF THE CASE

James LaVine was expelled from the eleventh grade at Blaine High School for showing his English teacher a poem that contained violent imagery. The poem described

the feelings of a person who shot and killed twenty-eight people at a school two years earlier and decides to kill himself. Although the poem made no threats and posed no risk of disrupting school activities, the school punished James by expelling him.

James Lavine lives on a farm in rural Blaine, Washington, and from time to time would compose poetry in the evening when his chores were done. One summer night in 1998, James wrote about the recent schools shootings that he had read about. (ER 1:21) He drafted a poem, longhand, on a pad of paper, titled it "Last Words," and typed it into his computer. James described the poem as "an attempt to get insight into the mind of a person who had killed his classmates and what they were feeling as they reflected back on this event. One reason that I used the first person was because my previous Blaine English teacher had taught us that use of the first person in poetry was more powerful than the third person." (ER 2:19). When writing the poem, James tried to understand why someone would shoot his or her classmates.

"Last Words" narrates the thoughts of a shooter two years after he or she killed twenty-eight classmates. At the time of the shootings the narrator felt no remorse:

> When it all was over,
> 28 were

dead,
and all I remember,
was not feeling,
any remorce,
for I felt,
I was
clensing my soul (ER 5)

But now, two years later, the shooter begins to understand the pain he or she inflicted on classmates and their families. Because of this remorse, the shooter decides to commit suicide.

2 years have passed,
and now I lay,
29 roses,
down upon,
these stairs,
as now,
I feel,
I may,
strike again.

No tears,
shall be shead,
in sarrow,
for I am,
alone,
and now,
I hope,
I can feel,
remorce,
for what I did,
without a shed,
of tears,

for no tear,
shall fall,
from your face,
but from mine,
as I try,
to rest in peace,
BANG!

(ER 5) (The entire poem is included as Appendix D.)

Shortly after school began in September 1998, James' English teacher, Vivian Bleeker, invited her students to turn in personal writings for her review. (ER 30:33; 2:11) James responded by turning in his poem, "Last Words." (ER 2:8) James had previously submitted poems to teachers and benefited greatly from their editing and comments.

On Friday afternoon, October 2, 1998, James handed Ms. Bleeker his poem at the end of class. She later testified that she responded enthusiastically: "I said, 'Thanks, James, I like it. I like to read students' writing and I appreciate it.' And I said, 'This will be a real treat for me.'" (ER 18:18).

Ms. Bleeker read the poem later that evening. (ER 19:21) At James' expulsion hearing, she testified to the School Board that the poem concerned her as indicating that James may be "hurting." She did not see the poem as a threat or worry about the safety of anyone but James. (ER 24: 16-18)

Ms. Bleeker called the school counselor, Karen Mulholland, on Saturday, October 3, 1998, and met with her at the school in the evening. (ER 21:19) Mulholland, like Bleeker, did not interpret the poem as a threat (ER 56:5), but thought it prudent to call Vice Principal Tim Haney.

Haney read the poem as a threat to murder children or staff and called in the Blaine Police Department. Haney later testified that he saw the poem as a violation of the School's disciplinary code that warranted punishment:

> Q: So when you read this poem you take it as a threat to murder?
> A: Absolutely.
> Q: And since you take it as a threat to murder, you take this poem as a violation of the disciplinary code?
> A: Absolutely. And any student that would turn that in, irregardless of behavior that precipitated this, I would do the same thing.

(ER 67:18-68:1)

Rather than ask James what the poem meant, or even discuss that with his English teacher, Vice Principal Haney took immediate action based on his conclusion that the poem violated the school's disciplinary policy. At 10:30 p.m. on Saturday night, several Sheriff's deputies went to the LaVine house. The deputies interviewed James and his parents and "found no probable cause . . . to involuntarily commit James

for a mental evaluation." (ER 122-23)

Mulholland contacted Whatcom County's Emergency Services Psychologist, Dr. Charles DeWitt, for advice. After reviewing the matter with Mulholland and the deputies who interviewed James, Dr. DeWitt concluded that James was not dangerous:

> In my professional opinion on a more probable than not basis, based on the information provided to me by the District and the law enforcement scene who had personally observed him, there were insufficient grounds for anyone to make a determination that James LaVine was in imminent danger of causing serious harm to himself or others.

(ER 233:9)

On Monday morning, October 5, 1998, Principal Daniel Newell called James and his parents to a meeting at the school. The Principal had already prepared a letter, which he gave to the LaVines at the meeting, announcing that the School District was expelling James because his poem violated the school's disciplinary policy. The letter stated:

> This letter is to inform you of the following violations of the Blaine High School Disciplinary Policy by your son James . . . ON OCTOBER, 2, 1998 AT 2:50 P.M. YOUR SON JAMES PRESENTED A PAPER TO HIS ENGLISH TEACHER, WHICH IMPLIED EXTREME VIOLENCE TO OUR STUDENT BODY. . . . This

> violation was of a nature significant enough to be classified as dangerous to your son and/or a threat to other students and/or a threat of serious disruption to the education process. Therefore I impose the sanction of EMERGENCY EXPULSION.

(ER 186) (emphasis in original).

Newell concluded that James was a threat to himself and others, but neither he nor anyone else in the school district had consulted any mental health professional, other than Dr. DeWitt, who had concluded that James posed no danger to himself or others. No mental health expert had diagnosed James as dangerous or suffering from any mental disorder.

Indeed, the Principal and Vice-Principal both said that the reason for expelling James was to punish him for violating the school's disciplinary code. Vice Principal Haney stated that "[a]t the time of his expulsion on October 5, 1999, James was found to have violated the disciplinary provision regarding threats and dangerous behavior." (ER 223:3) Principal Newell stated that James was expelled due to, "violation of the school disciplinary code regarding threats and danger to students." (ER 225:4). Although James had been previously in trouble at the school for having two fights and for wearing a t-shirt that the Vice-Principal had found offensive, the Principal and Vice-Principal both said they

would have expelled James with or without the two fights and the t-shirt. (ER 65:8)

James appealed his expulsion to the Blaine School Board. Before the hearing, James agreed to be examined by a psychiatrist selected by the School Board. Dr. Robert Watson met with James and concluded that there was no evidence that James was dangerous, mentally disordered, or posed an actual threat to the school's safety. He concluded that it was safe for James to return to school. (ER 231)

On December 18, 1998, the School Board upheld the expulsion, but directed Principal Newell to replace his original October 5, 1998 letter with another, back-dated October 5, 1998, that the School Board had drafted with legal counsel. (ER 190). The revised letter deleted the reference to James' poem as an "implied threat" and relied instead on James' "suicidal feelings" and the perceived danger to himself, other students and staff. The School District's revised expulsion letter marked a shift in the explanation for excluding James from school. As the federal District Court noted, the new letter "emphasized that James was expelled for safety rather than for disciplinary reasons." (ER 343; Appendix at C-5).

James was expelled from school for 17 days. After returning, he completed high school without incident and

graduated in June 2000 with his class. Yet the expulsion had serious consequences for James' future. As Judge Kleinfeld noted in his dissent from the denial of en banc review, "James and his father brought this case in part because the disciplinary expulsion in his school record has kept James from enlisting in the armed forces." 279 F.3d at 724.

James filed this lawsuit in the United States District Court for the Western District of Washington to challenge the constitutionality of his expulsion. The parties filed cross-motions for summary judgment, and the District Court found "the parties agree on the relevant facts, but disagree on the legal and constitutional conclusions to be drawn from those facts." (ER 344; Appendix at C-5).

The District Court granted partial summary judgment in favor of James, concluding the expulsion violated his First Amendment rights. The District Court found it "undisputed" that the school expelled James "solely for the evocative nature of his poem," that is, "the message contained" in it. (ER 344-45; Appendix at C-6). The District Court ruled that "Last Words" was not a threat or "a sincere expression of intent to harm or assault" and therefore concluded that the poem "falls squarely within the purview of the First Amendment's core protections." (ER 346; Appendix at C-7).

Although it recognized the need for judicial deference

to school officials, especially with concerns over violence, the District Court concluded that the expulsion was not a narrowly tailored means of achieving the school's interest in protecting the safety of its students. The District Court explained that "[a] temporary suspension pending psychiatric evaluation would have been a far less drastic measure and ultimately would have accomplished the defendants' purpose." (ER 348; Appendix at C-9).

The School District appealed and the United States Court of Appeals for the Ninth Circuit reversed the District Court's grant of partial summary judgment in favor of James. The Ninth Circuit concluded that speech in a high school constitutionally can be suppressed and punished if the school shows "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." 257 F.3d at 989. The court accepted the school's recharacterization of the expulsion as "trying to protect its students from potential violence," not as "trying to discipline James for his speech." 257 F.3d. at 989. The Ninth Circuit thus concluded that the expulsion did not violate the First Amendment and barred James' claim for damages, though it also ruled that the school could not keep the "negative documentation" in James' file because any danger was long over. 257 F.3d at 992.

The Court denied James' petition for rehearing en banc, over the dissents of Judges Reinhardt, Kozinski, and Kleinfeld.

REASONS FOR GRANTING THE WRIT

Throughout the country, schools are punishing students, like James LaVine, for their speech without requiring any showing that the speech disrupted, or was likely to disrupt, school activities. See, e.g., *Killion v. Franklin Reg's School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001); *D.G. v. Independent School Dist. Number 1 of Tulsa County*, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. 2000). *Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D. Mo. 1998); *State of North Carolina v. Joshua Michael Mortimer*, 542 S.E.2d 330 (N.C. 2001); Lisa M. Pisciotta, Beyond Sticks and Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats, 30 Seton Hall L. Rev. 635 n. 4 (2000) (describing incidents of students being disciplined for speech).

This case presents the important issue of whether schools may punish students for speech that does not contain threats and is not likely to disrupt school activities. The District Court's conclusion that James' poem contained no threats is undisputed. Nor is there any claim that there was any risk of school activities being disrupted by James

privately showing his English teacher the poem. Nor is there doubt that the poem was speech fully protected by the First Amendment. Indeed, students often read poems and stories with imagery far more violent than what James showed his teacher. See, e.g., *LaVine v. Blaine School District*, 257 F.3d 981, 985 (9th Cir. 2002) (Kleinfeld, J., dissenting from the denial of en banc review) (describing the violence in works such as Dostoevski's Crime and Punishment and songs such as "Tom Dooley.")

The school's only possible justification for expelling James was a concern that he might hurt himself or others. But, as the District Court concluded, this warranted only removing James temporarily from school pending psychiatric examination to ensure that he did not pose an unreasonable risk of harm. Instead, the school expelled James, making clear that his removal was punishment for violating the school's disciplinary code by showing an English teacher his poem.

This case offers a significant opportunity for this Court to clarify its ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), concerning when schools may punish student speech. There is a conflict among the lower courts over when students may be disciplined for

speech that poses no material risk of disrupting school activities. This issue is of great moment to school boards, school administrators, parents and students throughout in the United States.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OPINIONS OF THIS COURT DETERMINING WHEN A SCHOOL MAY PUNISH A STUDENT'S SPEECH

The Ninth Circuit's ruling in this case, allowing a student to be punished for speech that was not disruptive or a threat, contradicts this Court's command that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 506.

In *Tinker*, this Court held that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of speech of their views." 393 U.S. at 511. The Court ruled that school officials may punish students' speech only if "the students' activities would materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513.

Tinker rests on long-standing precedents of this Court recognizing that freedom of speech in schools is essential. Justice Robert Jackson's eloquent opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637, 63

S.Ct. 1178, 87 L.Ed. 1628 (1943), explained the importance of protecting students' creative expression:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education are not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Justice William Brennan confirmed this when he wrote:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'

Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

In the two cases since *Tinker* addressing student speech, this Court has reaffirmed that "students do not 'shed their constitutional rights to freedom of speech at the schoolhouse gate.'" *Bethel School District v. Fraser*, 478 U.S. 675, 680, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266,

108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

The Court now has the opportunity to reaffirm its earlier decisions and to hold again that a school may punish student speech only upon proof that the speech would "substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker v. Des Moines Board of Education*, 393 U.S. at 509. In *Tinker*, this Court stated:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action is something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in of the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.

393 U.S. at 509 (citation omitted).

The Ninth Circuit's ruling is inconsistent with this requirement. Although it purported to apply the *Tinker* test, the Ninth Circuit concluded that "these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities -- specifically, that James was intending to inflict injury upon himself of others." 257 F.3d at 989. The court

treated the expulsion as "trying to protect its students from potential violence," not as trying to discipline James for his speech. 257 F.3d at 991.

There are several serious problems with this analysis. First, the poem did not threaten anyone. "True threats" are unprotected by the First Amendment. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-929, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). James' poem described events occurring two years earlier; it did not threaten any teacher or student. Indeed, the District Court concluded: "[T]he record presented permits no finding other than that 'Last Words' was not a sincere expression of intent to harm or assault." (ER 346; Appendix at C-7)

As Judge Kleinfeld noted in his dissent to the denial of en banc review: "The school administrators did not read the poem carefully enough to notice when it used the past tense and when it used the future tense, so they misread a dramatic monologue about a crime two years before as a statement that the monologuist intended to commit the crime in the future." 279 F.3d at 724.

The teacher who read the poem, Ms. Bleeker, did not regard it as a threat. (ER 24:14) The Sheriff's deputies who interviewed James did not judge him as a threat to himself or

others. (ER 122-23) Dr. Charles DeWitt, a licensed psychologist with the Whatcom County Department of Mental Health, reviewed the poem, spoke with the Sheriff's deputies, and also concluded that James did not pose a threat to himself or anyone at the school. (ER 233:9) Thus, the District Court ruled that "'Last Words' was not a sincere expression of intent to harm or assault, and the poem therefore falls squarely within the purview of the First Amendment core protection." (ER 346; Appendix at C-7).

Second, there was not a sufficient likelihood of disruption of school activities under the *Tinker* standard to justify punishing James. He shared the poem privately with his teacher. This case is unlike *Bethel School District v. Fraser*, where a lewd speech at a school assembly disrupted the school. Because the poem was not a threat and did not provide any basis for predicting that James would harm those at school, there was not the likelihood of disruption that *Tinker* requires as a basis for constitutionally disciplining a student for speech. *Tinker* held that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." 393 U.S. at 508. But that is all that existed here: "undifferentiated fear" based on misreading James' poem and the failure to heed the conclusions of law enforcement and

mental health professionals that James posed no danger.

This Court should grant review to reaffirm its ruling in *Tinker* and to make clear that students cannot be disciplined unless there is a showing of that the speech would "materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513. The School District has not satisfied this standard.

Third, James was punished for violating the school's disciplinary code; the school did not merely exclude him for a short period to evaluate whether he posed a risk to himself or others. Principal Newell's expulsion letter charged James with violating the school's disciplinary code. (ER 186) Only months later, on advice of counsel, did the School Board change its rationale and order a back-dated letter justifying the expulsion as a safety measure. (ER 190).

No one denies that school officials could have temporarily removed James from school pending a psychiatric evaluation to ensure that he did not pose an unreasonable risk of harm. If the school's concern was safety, this, not expulsion, was the appropriate action. The District Court reached exactly this conclusion when it ruled "[a] temporary suspension pending psychiatric examination would have been a far less drastic measure and ultimately would have accomplished the defendants' purpose." (ER 348;

Appendix at C-9).

Instead, James suffered discipline by expulsion for the content of his speech. Although courts must respect the expertise of school officials, the "discretion of . . . local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). Punishing James because of the content of his poem does not respect the imperatives of the First Amendment.

James' case allows this Court to reaffirm *Tinker* by reminding schools across the country that students may not be punished for speech unless there is a significant likelihood of substantially disrupting school activities.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER FEDERAL COURT RULINGS CONCERNING WHEN A SCHOOL MAY PUNISH A STUDENT'S SPEECH

In *Bethel School District v. Fraser*, this Court held that schools may prohibit and punish a "lewd and vulgar" speech because of the school's "basic educational mission" of teaching civility in public discourse. 478 U.S. at 685. In *Hazelwood School District v. Kuhlmeier*, this Court held that school officials may control the content of a school newspaper published as part of the school's journalism class

so long as the school's judgments "are reasonably related to legitimate educational concerns." 484 U.S. at 273.

Neither of these cases, though, concerns the issue that schools across the country face: when may students be disciplined for speech that is neither lewd nor part of an official school newspaper? Because of the lack of Supreme Court guidance, lower courts have adopted divergent approaches.

Some lower courts adhere to the *Tinker* standard, holding that students may be punished only if the speech poses a substantial likelihood of materially disrupting school activities. For example, in *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), the Third Circuit applied *Tinker* to invalidate a public school's anti-harassment policy as violating the First Amendment. The Court explained that "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." 240 F.3d at 212. In *Killion v. Franklin Regional School Dist.*, 136 F.Supp.3d 446 (W.D. Pa. 2001), the District Court ruled that it was unconstitutional to punish a student for circulating a derogatory "top ten" list about the school's athletic director. The court emphasized that the speech did not present a significant likelihood of disrupting school activities. In *Beussink v. Woodland R-IV School*

District, 30 F.Supp.2d 1175 (E.D. Mo. 1998), the District Court held the First Amendment prevented school officials from punishing a student for having a home page on his personal computer that used vulgar language to criticize the teacher and principal.

But in other cases, lower courts dilute the *Tinker* standard and allow discipline of students without a showing of a substantial likelihood of disrupting school activities. These lower courts have adopted a very deferential rational basis test. For example, in *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989), an honor student and candidate for student council president was disqualified from the election because he made a rude and discourteous statement about the assistant principal in his campaign speech. The court applied a rational basis test, saying that the sole issue before it was "whether the actions of the school officials are reasonably related to legitimate pedagogical concerns." 872 F.2d at 762.

Similarly, in *Bystrom v. Fridley High School, Indep. School Dist. No. 14*, 822 F.2d 747 (8th Cir. 1987), the Eighth Circuit used the rational basis test to uphold a school district's policy of requiring prior approval of all materials distributed on school grounds. The Court said that "decisions of school officials will be sustained, even in a first amendment context, when, on the facts before them at the time of the conduct

which is challenged, there was a substantial and reasonable basis for the action taken." 822 F.2d at 1390.

In *Baxter v. Vigo County School Corporation*, 26 F.3d 728 (7th Cir. 1994), the Seventh Circuit essentially used the rational basis test and upheld the suspension of students for wearing t-shirts protesting racism and the schools' grading policy. Similarly, in *Gano v. School District No. 411 of Twin Falls County*, 674 F.Supp. 796 (D. Idaho 1987), the District Court upheld the suspension of students for wearing a t-shirt depicting three school administrators inebriated, without requiring the district to show a substantial likelihood of disrupting school activities.

Federal Courts disagree over the appropriate standard under the First Amendment for disciplining student speech. Some lower courts follow *Tinker's* command; others use a deferential rational basis test. This Court should grant review to resolve the conflict among the lower courts and to clarify this issue affecting schools and students across the country.

CONCLUSION

James LaVine lost 17 days of school because he wrote a poem and shared it with his teacher. The First Amendment protects student expression, including James' poem.

James LaVine respectfully requests this Court to grant his Petition for Writ of Certiorari and accept review of his case.

Respectfully submitted,

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BRUCE LAVINE, as next friend of James LaVine; JAMES LAVINE, Plaintiffs-Appellees, v. BLAINE SCHOOL DISTRICT, a municipal corporation; TIM HANEY; DAN NEWELL; KAREN MULHOLLAND, Defendants-Appellants.

No. 00-35303

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

257 F.3d 981; 2001 U.S. App. LEXIS 16079; 2001 Cal. Daily Op. Service 6088; 2001 Daily Journal DAR 7500

December 4, 2000, Argued and Submitted, Seattle, Washington

July 20, 2001, Filed

PRIOR HISTORY:

[1]** Appeal from the United States District Court Western District of Washington. D.C. No. CV-99-01074-BJR. Barbara J. Rothstein, Chief Judge, Presiding.

DISPOSITION:

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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For AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, Amicus: Michael W. Gendler, Esq., BRICKLIN AND GENDLER, Seattle, WA.

JUDGES:
Before: Betty B. Fletcher and Raymond C. Fisher, Circuit Judges, and William W Schwarzer, * District Judge. Opinion by Judge Fisher.

* Honorable William W Schwarzer, Senior District Judge for the Northern District of California, sitting by designation.

OPINION BY:
Raymond C. Fisher

OPINION:

[*983]

FISHER, Circuit Judge:

This case has its genesis in a high school student's poem, which led to his temporary, emergency expulsion from school. It arises against a backdrop of tragic school shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they

perceived was the student's implied threat of violent harm to himself and others. Given the knowledge the shootings [**2] at Columbine, Thurston and Santee high schools, among others, have imparted about the potential for school violence (as rare as these incidents may be when taken in context), we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either. Schools must be safe, but they are educational institutions after all, and speech -- including creative writing and poetry -- is an essential part of the educational fabric. Although this is a close case in retrospect, we conclude that when the school officials expelled James LaVine they acted with sufficient justification and within constitutional limits, not to punish James for the content of his poem, but to avert perceived potential harm.

FACTUAL AND PROCEDURAL BACKGROUND [1]

In the fall of 1998, James LaVine was in eleventh grade and a student in Vivian Bleecker's sixth period English class at Blaine [**3] High School. One evening in June or July 1998, James wrote the first draft of a poem he entitled" Last Words." The final version reads:

As each day passed,

I watched,

love sprout, from the most,

unlikely places,

wich reminds,

me that,

beauty is in the eye's,

of the beholder.

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[1] All of these facts are undisputed.

As I remember,
I start to cry,
for I,
had leared,
this to late,
and now,
I must spend,
each day,
alone,
alone for supper,
alone at night,
alone at death.
Death I feel,
crawlling down,
my neck at,
every turn,
and so,
now I know,
what I must do.
I pulled my gun,
from its case,
and began to load it.
I remember,
thinking at least I won't,
go alone,
as I,

jumpped in,
the car,
all I could think about,
was I would not,
go alone.
As I walked,
through the,
now empty halls,
I could feel,
my hart pounding.
As I approached,
the classroom door,
I drew my gun and,
threw open the door,
Bang, Bang, Bang-Bang.
When it all was over,
28 were,
dead,
and all I remember,
was not felling,
any remorce,
for I felt,
I was,
clensing my soul,
I quickly,
turned and ran,

as the bell rang,
all I could here,
were screams,
screams of friends,
screams of co workers, [**4]
and just plain,
screams of shear horor,
as the students,
found their,
slayen classmates, [*984]
2 years have passed,
and now I lay,
29 roses,
down upon,
these stairs,
as now,
I feel,
I may,
strike again.
No tears,
shall be shead,
in sarrow,
for I am,
alone,
and now,
I hope,

I can feel,

remorce,

for what I did,

without a shed,

of tears,

for no tear,

shall fall, from your face,

but from mine,

as I try,

to rest in peace,

Bang!

Around that time, several school shootings had occurred -- including the tragedy at Thurston High School in nearby Springfield, Oregon -- and were frequent topics in the news.[2] The morning after James wrote the poem, he showed it to his mother. She warned James not to turn the poem in to his teachers at school, because "with everything that was on the news ... whoever read it might overreact."

[5]**

James forgot about the poem until he rediscovered it in his living room on September 30, 1998. He made some editorial changes and brought it to school on Friday, October 2. He showed the poem to several of his friends, some of whom liked it and some of whom did not. At that point, he decided to ask his English teacher, Ms. Bleecker, her opinion of "Last Words."

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[2] On May 21, 1998, a 15-year-old freshman, suspended a day earlier for bringing a gun to school, shot and killed two students and injured 25 others at Thurston High School. See Maxine Bernstein, Kinkel Gets Life in Prison, Portland Oregonian, Nov. 11, 1999, at A1.

James had not been in school for the three days prior to October 2. At the end of his sixth period English class, he turned in several assignments and the poem. James asked Bleecker if she would read the poem and tell him what she thought. Bleecker thanked James for the poem and said she looked forward to reading it. The poem was not an assignment or an "extra credit" project, but James had turned in other poems to his previous English teachers at Blaine High School and appreciated their feedback.

That evening, Bleecker read "Last Words" and became concerned. Her impression of James up to that time was that he was a very quiet student. She thought the poem might be "James' way of letting somebody know that ... maybe something's hurting him, maybe he's upset about something, maybe he's afraid." The next morning (Saturday), **[**6]** Bleecker contacted Karen Mulholland, James' school counselor, to discuss the contents of the poem. Mulholland was similarly concerned and set up a meeting that evening with Bleecker and Tim Haney, the school's vice principal.

During his time at Blaine High School, James had frequently confided in Mulholland, who is also a school psychologist. In 1996, James told her that he thought about suicide. Mulholland made James promise her that he would talk to her before he tried to kill himself. Thereafter, Mulholland kept an eye out for James and tried to make time to help him when he needed it. In fall 1998, James told her about several incidents that had occurred in his home. In particular, on September 12, James and his father had had an argument about James' car. James' father, Bruce, had thrown a rock in the direction of James and his car. James called the police, who filed charges against Bruce. As a result of the charges, a court issued a no-contact order that led to James moving out of his home temporarily to live with his sister. James had also missed school on September 17, 1998 to participate in the resulting legal proceedings. In addition, in the preceding weeks, James had broken **[**7]** up with his

girlfriend. The school authorities had become aware of this because the ex-girlfriend's mother had called the school to report that James was stalking her daughter. **[*985]**

Mulholland disclosed these events to Haney and Bleecker. Haney also reviewed James' disciplinary file, which recorded several additional incidents, including a fight in February 1998 and an episode of insubordination with a teacher in March 1997. Moreover, Haney said that a few weeks before October 2, 1998, he had personally disciplined James for wearing to school a T-shirt emblazoned with the words "eat shit and die." Haney's impression of James at that time was that he was a "good kid, but ... somewhat of a 'loner.'"

Given the content of the poem, and his knowledge of James' suicidal thoughts, family situation and past incidents, Haney decided at the Saturday meeting to call James' home to find out if James would be attending the school's home-coming dance that evening. Haney learned that James would not be attending the dance. Haney, nonetheless, decided to contact the Blaine Police Department for guidance about the situation. At the police department's suggestion, the school officials called Washington **[**8]** State's Child Protective Services, which then suggested they call the Community Mental Health Crisis Line. The Crisis Line in turn put them in touch with Dr. Charles Dewitt, the psychiatrist on duty for that evening. Dr. Dewitt suggested James be picked up by the police for evaluation.

The Whatcom Sheriff's Department, the law enforcement agency having jurisdiction over James' neighborhood, dispatched deputy sheriffs to the LaVines' family farm to conduct a welfare check of James. A deputy sheriff interviewed James to determine whether a medical evaluation was needed. James told the deputy that "he often writes poetry and has his teachers review them. He has never written this type of poem in the past and had no explanation

why he wrote this one." James further told the officer he had no access to weapons and had no intention of carrying out any of the acts in the poem. James' mother assured the deputy that James had no access to weapons and was not a danger to himself or others. The deputy found no probable cause to commit James involuntarily, and James was unwilling to undergo a voluntary psychological examination. The deputy telephoned Dr. Dewitt and reported his observations. **[**9]** Based upon Dr. Dewitt's conversation with the deputy and with the school officials, Dr. Dewitt concluded, "[in] my professional opinion on a more probable than not basis based upon the information provided to me by the District and the law enforcement [officers] who had personally observed him, there were insufficient grounds for anyone to make a determination that James LaVine was in imminent danger of causing serious harm to himself and others." Dr. Dewitt accordingly decided not to commit James.

On Sunday, Haney met with Principal Dan Newell regarding James and informed him of James' background. By then, Newell had been informed that the sheriff and mental health professionals had decided not to commit James. That Sunday, based upon the information he had, Newell decided to "emergency expel" James under Washington Administrative Code § 180-40-295.[3] Haney left a message **[*986]** with James' parents that day telling them to attend a

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[3] WASH. ADMIN. CODE § 180-40-295 provides:

Notwithstanding any other provision of this chapter, a student may be expelled immediately by a school district superintendent or a designee of the superintendent in emergency situations: Provided, That the superintendent or designee has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process. An emergency expulsion shall continue until rescinded by the superintendent or his or her designee, or until modified or reversed pursuant to the hearing provisions set forth in WAC 180-40-305 or the appeal provisions set forth in WAC 180-40-315.

meeting the next morning at the school. At 8:00 a.m. on Monday, Newell told James and his father that James was being emergency expelled from school. This expulsion was formally expressed in a letter of the same date.[4] That letter in relevant part states: **[**10]**

This letter is to inform you of the following violations of the Blaine High School Discipline Policy by your son James:

On October 2, 1998 at 2:50 p.m., your son James presented a paper to his English teacher, which implied extreme violence to our student body.

This violation of [sic] was of a nature significant enough to be classified as dangerous to your son and/or a threat to other students and/or a threat of serious disruption to the education process. Therefore I impose the sanction of emergency expulsion.

After James' father was informed of the emergency expulsion, he became hostile and began using foul language. James, too, became upset, used profanity and ran out of the office.
[11]**

After James was expelled, his parents hired an attorney, Breean Beggs, and appealed James' expulsion to the Blaine School Board. Beggs had several conversations with the school district's attorney, J. Timothy Slater, about how James could return to school. Slater suggested that James be evaluated by a psychiatrist, at the school district's expense, to determine whether it was safe for James to return to class. Once this proposal was agreed to, James met with Dr. Watson, a psychiatrist, on three occasions. After the third meeting on October 26, 1998, Dr. Watson felt he could recommend James' return to school. Dr. Watson also opined

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[4] The record is unclear as to whether this letter was given to the LaVines at the Monday meeting or at some later time.

that when James turned in the poem, he needed to be evaluated and that he would have recommended removing James from school. Shortly thereafter, the school district rescinded its expulsion and James was allowed to return to school after missing 17 days. He completed the school year without incident.

Even though James was allowed to return to school, **[**12]** James and his parents continued with their appeal of the expulsion to the School Board. Concerned that the October 5 letter would hurt James' chances of entering the military, they requested that it be removed from James' file. After a hearing on December 15, 1998, the Board affirmed the expulsion, but agreed to rewrite the letter. A new, back-dated letter was substituted emphasizing that James was expelled for safety as opposed to disciplinary reasons; the revised letter did not refer to events that had transpired subsequent to October 5, 1998.

James and his father filed suit in federal court on July 6, 1999, claiming the Blaine School District, Tim Haney, Dan Newell and Karen Mulholland (collectively "the school" or "defendants") violated James' constitutional rights by expelling him and maintaining documentation in his school file. The suit asked for general and specific damages and for an order permanently enjoining defendants from maintaining any letters in James' file regarding his expulsion. Plaintiffs and defendants both moved for partial summary judgment on the First Amendment claim. The district court granted plaintiffs' motion and denied **[*987]** defendants' motion on February 24, 2000, at **[**13]** which time the court entered an injunction preventing the school district from placing or maintaining any negative documentation in James LaVine's school file.

JURISDICTION

The district court had jurisdiction under *28 U.S.C. § 1331,* because the complaint raised federal questions based

upon alleged violations of the United States Constitution. The district court entered partial summary judgment in favor of the plaintiffs and granted the plaintiffs injunctive relief. In its order, the district court stated, "the LaVines are entitled to the equitable remedy of an injunction preventing the placement or maintenance of any negative documentation of this incident in James Lavine's school file." Defendants filed a timely notice of appeal of that order. We have jurisdiction over this interlocutory appeal pursuant to *28 U.S.C. § 1291*(a)(1), because the district court's order granted a permanent injunction. *Dare v. California, 191 F.3d 1167, 1170 (9th Cir. 1999).* Because the district court's partial summary judgment order provides legal authority for the injunction and is thus inextricably bound with it, we also have jurisdiction **[**14]** to review the legal authority underlying the injunction. Id.; *Paige v. California, 102 F.3d 1035, 1040 (9th Cir. 1996).*

STANDARD OF REVIEW

We review for abuse of discretion the district court's imposition of a permanent injunction, but review any determination underlying the grant of the injunction by the standard that applies to that determination. *Dare, 191 F.3d at 1170.* A district court's grant or denial of summary judgment is reviewed de novo. *Balint v. Carson City, 180 F.3d 1047, 1050 (9th Cir. 1999)* (en banc); *Laborers Health & Welfare Trust v. Westlake Dev., 53 F.3d 979, 981 (9th Cir. 1995).* Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, (a) "the district court correctly applied the relevant substantive law" and (b) there are no genuine issues of material fact. Id.

DISCUSSION

As we noted at the outset, we live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spate of

school shootings have put our nation on edge and have focused attention on what [**15] school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies. After Columbine, Thurston, Santee and other school shootings, questions have been asked about how teachers or administrators could have missed telltale "warning signs," why something was not done earlier and what should be done to prevent such tragedies from happening again. Although schools are being asked to do more to prevent violence, the Constitution sets limits as to how far they can go. Just as the Constitution does not allow the police to imprison all suspicious characters, schools cannot expel students just because they are "loners," wear black and play video games. See Kevin Fagan, Life Harder for Teen Out-casts: For Some Bay Area Kids, Times Are Tougher Since Littleton, S.F. Chron., May 7, 1999, at A1 (listing attributes routinely ascribed to potential school shooters). Schools must achieve a balance between protecting the safety and well-being of their students and respecting those same students' constitutional rights. See *Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973)*; cf. *New Jersey v. T.L. O., 469 U.S. 325, 339-40, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985)* [**16] (balancing, in the Fourth Amendment context, students' interest in privacy against [*988] schools' interest in maintaining discipline and security).

The LaVines, in this lawsuit, argue that the school failed to reach the proper balance when it expelled James. They contend that James' poem is protected by the First Amendment and that he was unconstitutionally disciplined for the content of his speech. The school argues that James was not disciplined because of the poem, but was expelled based upon a confluence of factors, including the poem, that indicated he was a danger to the safety of the school and to himself.

To determine whether the school violated James' First Amendment rights, we must consider what those rights are.

Public school students are protected by the First Amendment and do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)* (upholding students' right to wear black armbands in protest against the Vietnam War). The First Amendment rights of public school students, however, "'are not automatically coextensive **[**17]** with the rights of adults in other settings'" and must be "'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)* (holding school principal could censor the student newspaper) (quoting *Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)* (holding school could punish students for making lewd remarks at school assembly), and *Tinker, 393 U.S. at 506,* respectively). For example, a school need not tolerate student speech that is inconsistent with its basic educational mission. *Hazelwood, 484 U.S. at 266;* compare *Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 527-31 (9th Cir. 1992)* (holding students had pled a First Amendment violation where they alleged they had to remove buttons containing the word "scab" during a teachers' strike).

In the school context, we have granted educators substantial deference as to what speech is appropriate. "The daily administration of public education is committed to school officials. *Epperson v. Arkansas, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968).* **[**18]** That responsibility carries with it the inherent authority to prescribe and control conduct in the schools." *Karp, 477 F.2d at 174.* States have a compelling interest in their educational system, and a balance must be met between the First Amendment rights of students and preservation of the educational process. Id. As a consequence, courts are not in the best position to decide what schoolhouse speech

restrictions are appropriate. *Chandler, 978 F.2d at 527.* "'The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' rather than with the federal courts." *Hazelwood, 484 U.S. at 267* (quoting *Fraser, 478 U.S. at 683)* (internal citation omitted). With that said, deference does not mean abdication; there are situations where school officials overstep their bounds and violate the Constitution. In deciding whether school officials have infringed a student's First Amendment rights, we must first determine what type of student speech is at issue. In Chandler, we "discerned three distinct areas of student speech," each of which is governed **[**19]** by different Supreme Court precedent:

(1) vulgar, lewd, obscene and plainly offensive speech is governed by Fraser;

(2) school-sponsored speech is governed by Hazelwood; and **[*989]**

(3) speech that falls into neither of these categories is governed by Tinker.

Chandler, 978 F.2d at 529. James' poem clearly falls within the third category.[5]

"Last Words" is not vulgar, lewd, obscene or plainly offensive. It is not "an elaborate, graphic, and explicit sexual metaphor" as was the student's speech in Fraser, nor does it contain the infamous seven words that cannot be said on the public airwaves. See *FCC v. Pacifica Found., 438 U.S. 726,*

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[5] The school argues that James' poem was a "true threat" and not protected by the First Amendment at all. See *Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371 (9th Cir. 1996).* Because we conclude that even if the poem was protected speech, the school's actions were justified, we need not resolve this issue.

57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978) **[**20]** (holding FCC could sanction a radio station for broadcasting George Carlin's "Filthy Words" monologue). Further, the poem was not "school sponsored" speech. It was not a "speech or speech-related activity that 'students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" *Chandler, 978 F.2d at 529* (quoting *Hazelwood, 484 U.S. at 271).* Unlike the school assembly in Fraser, or the school newspaper in Hazelwood, no one could reasonably perceive James' poem to have the imprimatur of the school. It was not an assignment, it was not published in a school publication and James showed it only to several students and his teacher, Ms. Bleecker.

To suppress speech falling within Chandler's "all other speech" category, school officials must justify their decision by showing "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker, 393 U.S. at 514.* Tinker does not require school officials to wait until disruption actually occurs before they may act. *Chandler, 978 F.2d at 529;* **[**21]** *Karp, 477 F.2d at 175.* "In fact, they have a duty to prevent the occurrence of disturbances." Id. (quoting *Karp, 477 F.2d at 175).* Forecasting disruption is unmistakably difficult to do. Tinker does not require certainty that disruption will occur, "but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption." *Karp, 477 F.2d at 175.*

In applying Tinker, we look to the totality of the relevant facts. *Id. at 174.* We look not only to James' actions, but to all of the circumstances confronting the school officials that might reasonably portend disruption. *Id. at 175.* When we look to all of the relevant facts here, we conclude that the school did not violate the First Amendment when it emergency expelled James.

The school had a duty to prevent any potential violence on campus to James or to other students. When the school officials made their decision not to allow James to attend class on Monday morning, they were aware of a substantial number of facts that in isolation would probably not have warranted their response, but in combination **[**22]** gave them a reasonable basis for their actions. The school was aware that James previously had suicidal ideations that he had shared with school officials. The officials were aware that James was involved in a domestic dispute where he was forced to move out of his family home. James told Mulholland that his filing charges against his father caused financial pressure on his family because of the legal costs associated with his father's defense, and that in turn his family placed pressure upon him to rescind his allegations. The school was also aware that in the past weeks James had broken up with his girlfriend and he was reportedly stalking her. Moreover, James had had several **[*990]** disciplinary problems in the past, at least one of which involved some violence. Further, in the three days prior to turning in the poem, James had been absent from school, a cause of concern.

Last, and maybe most importantly, there was the poem itself. "Last Words" is filled with imagery of violent death and suicide. At its extreme it can be interpreted as a portent of future violence, of the shooting of James' fellow students. Even in its most mild interpretation, the poem appears to be a "cry for help" from **[**23]** a troubled teenager contemplating suicide. Taken together and given the backdrop of actual school shootings, we hold that these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities -- specifically, that James was intending to inflict injury upon himself or others.

It is true that the Whatcom Sheriff's Department and Dr. Dewitt did not believe James should be involuntarily

committed, but the standard for involuntary commitment is not the same as that for school officials to take action. To commit a minor 13 years of age or older involuntarily in Washington State, a mental health professional must conclude that the minor is suffering from a mental disorder and presents a likelihood of serious harm. See WASH. REV. CODE § 71.34.050. Under Tinker, there is no requirement that the student be mentally ill and likely to cause serious harm. Indeed, because of the special circumstances of the school environment, the level of disturbance required to justify official intervention is lower inside a public school than it is outside the school. *Karp, 477 F.2d at 175.* **[**24]**

Given the potential for substantial disruption, we cannot fault the school's response.[6] In Washington, if school officials want to immediately bar a student from coming to school for safety purposes, they have only one option -- emergency expulsion under Washington Administrative Code § 180-40-295. Under § 180-40-295, if school officials have "good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process," they can emergency expel the student until they deem it safe for the student to return. Here, after emergency expelling James, the school allowed him to return to classes as soon as he was evaluated by a psychiatrist who determined in his professional opinion that James was not a threat to himself or others.[7] Considering all of the relevant

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[6] Various governmental agencies, including the United States Department of Education and Department of Justice, as well as other organizations have begun to address school violence issues, and to provide resources to schools and communities to deal with the problem. See, e.g., U.S. Dept. of Justice, Youth Violence, www.usdoj.gov/youthviolence.htm. **[**25]**

[7] The cooperative arrangement between the school and the LaVines to

facts and the totality of the circumstances, we hold that the school's emergency expulsion was reasonable and did not violate the First Amendment.

The LaVines contend that James was expelled for the content of his poem and that the school's actions were punitive and **[*991]** not meant to protect the safety of James or others. They believe this is evidenced by the original expulsion letter, Haney's and Newell's testimony before the school board, references in James' file and other documents. Even viewing these items of evidence in the perspective most favorable to the LaVines, our conclusion is unchanged. The content of James' poem was admittedly a factor in the decision to emergency expel James. It is because the content of **[**26]** James' speech was a factor in the decision that we analyze the school defendants' actions to determine whether they violated the First Amendment at all. There is undisputed evidence in the record, however, that Principal Newell considered other factors beyond the poem in deciding to emergency expel James.[8] Newell stated that he considered James' suicidal ideations, disciplinary history, family situation, recent break-up with his girlfriend and the report of stalking her and the recent school shooting in nearby Springfield in addition to the content of the poem when he made his final decision.

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provide counseling and evaluation is commendable. Simply expelling a student without providing some kind of counseling or supervision might not be the best response to a school's concern for potential violence. See, e.g., Maxine Bernstein, Kinkel Gets Life in Prison, Portland Oregonian, Nov. 11, 1999, at A1 (describing how the school shooter had been suspended by the school the day before he committed his murders); see also note 6, supra.

[8] There was testimony by Vice Principal Haney that he would have emergency expelled anyone who wrote "Last Words." Whether the school may have expelled anyone for writing this poem is not what the school must defend here, however. The school must only defend its decision to emergency expel James.

The record is also clear that in addition to any potential disciplinary violation James may or may not have committed by writing **[**27]** the poem, the school was foremost concerned about student safety. This is primarily evidenced by the actions the school took immediately after James turned in the poem. As soon as James' teacher read the poem, she became worried about James' well being and called his school counselor. The counselor then read the poem, was also troubled by its content and called the school's vice principal. All three school officials then met on Saturday evening because they were concerned about what they should do to protect the student body's safety. Their first concern was the homecoming dance scheduled for that night. Haney decided to call James' home to see if he planned to attend the dance. Even though James said he would not be attending, Haney decided to warn security at the dance to be on the look-out for James. The three school officials then decided to call the police for help in this situation and were referred to a crisis hotline and eventually a psychiatrist. After discussing the situation with the psychiatrist, they decided that James should be evaluated by a mental health professional. Deputy sheriffs went to James' home for that purpose but, after James refused to be voluntarily examined, **[**28]** concluded that they lacked probable cause under Washington law to commit him. Taken together, the school's actions on the weekend before they emergency expelled him substantiate that it was not trying to discipline James for his speech, but was trying to protect its students from potential violence.[9]

In retrospect, it may appear that, as James' mother predicted, the school overreacted. James very well may have

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[9] Additionally, the school's actions after it emergency expelled James evidence that it was acting out of safety as opposed to disciplinary concerns. The school allowed James to return to class as soon as a mental health professional determined he was not a threat to himself or his classmates.

been using his poetry to explore the disturbing topic of school violence and chose to do so through the perspective of a suicidal mass murderer. In fact, James strongly contends this was all he was doing and that he had no intention of hurting himself or others. We have no reason now to disbelieve James, as he **[**29]** did return to Blaine High School without further incident. **[*992]** We review, however, with deference, schools' decisions in connection with the safety of their students even when freedom of expression is involved. At the time the school officials made their determination to emergency expel James, they had facts which might reasonably have led them to forecast a substantial disruption of or material interference with school activities. See *Tinker, 393 U.S. at 514.* School officials have a difficult task in balancing safety concerns against chilling free expression. This case demonstrates how difficult that task can be.

That said, even though we conclude that emergency expelling James did not violate the First Amendment, the same cannot be said for the school's placement and maintenance in James' file of what the district court characterized as "negative documentation." The school need not permanently blemish James' record and harm his ability to secure future employment. We recognize that the school may have had justification to document contemporaneously the reasons for its emergency expulsion, but the revised October 5, 1998 letter was written and maintained in James' file **[**30]** after the perceived threat had subsided, the school had allowed James to return to classes and had satisfied itself that James was not a threat to himself or others. As such, it created a permanent indictment of James without reference to the later, ameliorating events and thus went beyond the school's legitimate documentation needs. Accordingly, we affirm the district court's injunction prohibiting the placement or maintenance of any such negative documentation in James' file.

For the foregoing reasons we AFFIRM in part and REVERSE in part the district court's grant of partial summary judgment in favor of the plaintiffs and AFFIRM the injunction entered prohibiting the placement or maintenance of negative documentation in James' file. Because we conclude that even viewing the evidence in the light most favorable to the plaintiffs there is no genuine issue of material fact in dispute with regard to the expulsion claim, we also REVERSE in part the denial of partial summary judgment in favor of the defendants on this limited issue. REMANDED for further proceedings consistent with this opinion. Each side to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. [31]**

BRUCE LAVINE, as next friend of James LaVine; JAMES LAVINE, Plaintiffs-Appellees, v. BLAINE SCHOOL DISTRICT, a municipal corporation; TIM HANEY; DAN NEWELL; KAREN MULHOLLAND, Defendants-Appellants.

No. 00-35303

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

279 F.3d 719; 2002 U.S. App. LEXIS 1194; 2002 Cal. Daily Op. Service 836; 2002 Daily Journal DAR 1104

January 29, 2002, Filed

PRIOR HISTORY:
[**1] D.C. No. CV-99-01074-BJR.

Lavine v. Blaine Sch. Dist., 257 F.3d 981, 2001 U.S. App. LEXIS 16079 (9th Cir. Wash. 2001)

JUDGES:
Before: Betty B. Fletcher and Raymond C. Fisher, Circuit Judges, and William W Schwarzer, * District Judge. Dissent by Judge Reinhardt; Dissent by Judge Kleinfeld.

* Honorable William W Schwarzer, Senior District Judge for the Northern District of California, sitting by designation.

OPINION:

[*720] ORDER

The panel has unanimously voted to deny appellees' petition for rehearing filed August 3, 2001. Judge Fisher voted to reject the suggestion for rehearing en banc, and Judge Fletcher and Judge Schwarzer recommended rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DISSENT BY:
REINHARDT; KLEINFELD

DISSENT:

REINHARDT, Circuit Judge, dissenting from denial of rehearing en banc:

While I agree with most of what Judge Kleinfeld says and therefore join his dissent, I do not share his bleak **[**2]** view of the effect of this decision on the rights of students in this circuit. I do not agree that the erroneous result arrived at in this case compels or authorizes this court, or district courts, in future cases, to uphold discipline that impinges on the First Amendment activities of students, even when those students are emotionally disturbed. I read the panel's opinion essentially as approving only a brief suspension of a student pending determination of the existence of a safety question. Because the Washington statute contained no express provision for immediate "suspension," the panel treated the"

emergency expulsion" section as if it were such a provision. As Judge Kleinfeld so eloquently points out, in doing so, the panel erred -- in my opinion, largely because it left the impression that it approved of the imposition of discipline, discipline that simply was not warranted and that violated the student's First Amendment rights.

Specifically, I do not join in the introductory paragraph of Judge Kleinfeld's dissent or in the first sentence of either the fourth or seventh paragraphs of the Analysis section. Otherwise, I agree fully with his dissent.

I would add only that at **[**3]** times like those this nation now confronts, it is especially important that the courts remain sensitive to the demands of the First Amendment, a provision that underlies the very existence of our democracy. See *Brown v. Hartlage, 456 U.S. 45, 60, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982)* ("The First Amendment [is] the guardian of our democracy.") First Amendment judicial scrutiny should now be at its height, whether the individual before us is a troubled schoolboy, a right-to-life-activist, an outraged environmentalist, a Taliban sympathizer, or any other person who disapproves of one or more of our nation's officials or policies for any reason whatsoever.

KLEINFELD, Circuit Judge, with whom KOZINSKI, Circuit Judge, joins and REINHARDT, Circuit Judge, joins except as set forth in his separate dissent, dissenting from denial of rehearing en banc:

After today, members of the black trench coat clique in high schools in the **[*721]** western United States will have to hide their art work. They have lost their free speech rights. If a teacher, administrator, or student finds their art disturbing, they can be punished, even though they say nothing disruptive, defamatory or indecent **[**4]** and do not intend to threaten or harm anyone. School officials may now subordinate students' freedom of expression to a policy of making high schools cozy places, like daycare centers, where

no one may be made uncomfortable by the knowledge that others have dark thoughts, and all the art is of hearts and smiley faces. The court has adopted a new doctrine in First Amendment law, that high school students may be punished for non-threatening speech that administrators believe may indicate that the speaker is emotionally disturbed and therefore dangerous.

Facts

During all the press hullabaloo about school shootings, James LaVine, like a multitude of columnists and op-ed writers, wrote about school shootings. His attempt to understand was then presented as a poem, and it is disturbing. His "Last Words," reproduced in the appendix, describes the feelings of a person who shot and killed twenty-eight people at a school two years before and decides to kill himself because he fears he may kill again. James, then in the eleventh grade, gave the poem to his English teacher for review. The teacher found the poem disturbing and showed it to the school guidance counselor, principal, and vice-principal. **[**5]**

School officials considered James troubled and troublesome. School records said that James was "involved in a domestic violence situation with his father," because James had parked his car in the barn after his father told him not to, his father threw a rock at James's car, and James called the police. James had twice been in fights with other boys involving pushing, hitting and kicking. Two years before, he had confided to the school counselor that he had thought about suicide. He had recently broken up with his girlfriend, whose mother later told the school that James was stalking her daughter. He had earned the vice-principal's ire for wearing a shirt that said "eat shit and die." All of us who remember high school recognize the picture, the sort of boy that the vice-principal in charge of discipline keeps his eye on.

James's English teacher read the poem on Friday night, found it disturbing, and called the school counselor the next morning. The counselor called the vice-principal. The three of them met, and the vice-principal decided to call the city police. The city police told him to call state Child Protective Services. Child Protective Services told him to call the Community **[**6]** Mental Health Crisis Line. A psychologist at the crisis line told the vice-principal that the police should bring James in for an evaluation. James lived outside the city police department's jurisdiction, so the police asked the county sheriff to do the welfare check on James to determine whether he should be detained for a mental evaluation.[1]

A sheriff's deputy interviewed James and his mother, got a copy of the poem, and ascertained that James had no access to weapons. James's mother did not believe that he was a danger to anyone. James and his mother agreed to speak to **[*722]** counselors first thing Monday morning and apologize to the school faculty. The deputy sheriff telephoned the crisis line psychologist with his **[**7]** observations. The psychologist, based on the deputy's observations of the boy's behavior, and the information that the school district had provided, "determined that there was no legal cause for forcing the student to undergo a psychological examination." He gave the deputy sheriff his professional opinion. The deputy sheriff wrote in his report that "I found no probable cause existed to involuntarily commit James for a mental evaluation."

The principal consulted with his personnel, reviewed James's disciplinary history, learned the police weren't going to take action, and "emergency expelled" James.[2] The

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[1] See Wash. Rev. Code Ann. § 71.34.050(1) (West 2001) (authorizing a "county-designated mental health professional "to investigate information that a child thirteen or older "presents a likelihood of serious harm" as a "result of a mental disorder" and detain the child for evaluation).

[2] See Wash. Admin. Code § 180-40-295 (2001) (authorizing "emergency

principal and vice-principal thought that James was threatening to kill people when they read the poem. They did not read it carefully. The poem describes, through a dramatic monologue by a murderer, killings that took place two years ago. The speaker says he now fears that he "may strike again," so he will instead kill himself. The principal concluded that "James did something terribly wrong when he wrote this poem" because "the poem is a threat." James was expelled for writing the poem, and the principal and vice-principal both said he would have been expelled with or without [**8] the two fights and the t-shirt.

The school board affirmed the expulsion, but directed that a back-dated letter be put in James's file to say that James had been expelled for safety rather than disciplinary reasons, although the principal and vice principal who expelled him had been unequivocal in their testimony that they did so because they regarded his poem as a threat in violation of the school's discipline policy. The district court's summary judgment order concluded that "it is undisputed that the District's expulsion of James LaVine was motivated by the message contained in 'Last Words'" and that "he was not disciplined for the context in which he delivered his poem, but explicitly and solely for the evocative nature of his poem. [**9] "

After the expulsion, a child psychiatrist met with James and his parents three times and then decided "it was safe for James to return to Blaine High School." The expulsion was then lifted, and James returned to school without further incident. The psychiatrist wrote a letter saying that, had he been consulted prior to the expulsion, he would have recommended that "James be removed from school pending a mental health evaluation." He also signed a declaration filed

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expulsion" where the school has "good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel . . .").

in the summary judgment proceedings that "suicidal ideation, anti-social behavior, and written expression of homicide and suicide are indicators of a potential for violence."

James and his father sued for a judgment for damages on the ground that James's First Amendment rights were violated and for an injunction to remove the emergency expulsion from his file. The district court ruled on cross motions for summary judgment that, although the school could legitimately have made "a temporary suspension pending psychiatric examination," the expulsion was unconstitutional. It held that the LaVines were entitled to an injunction" preventing the placement or maintenance of any negative documentation of this incident in James **[**10]** LaVine's school file." Damages were to be **[*723]** determined in later proceedings. The district court did not certify the partial summary judgment for appeal pursuant to Federal Rule of Civil Procedure 54(b). The injunction was of course appealable under *28 U.S.C. § 1292*(a)(1).

The district court found that it was "undisputed "that the school expelled James "solely for the evocative nature of his poem," that is, "the message contained" in it. And since "'Last Words' was not a sincere expression of intent to harm or assault," the district court held that "the poem therefore falls squarely within the purview of the First Amendment's core protections." The district court then considered whether the expulsion was a narrowly tailored means of achieving the school's non-speech-related interest in protecting the safety of its students. The court held that it was not narrowly tailored, because "[a] temporary suspension pending psychiatric examination would have been a far less drastic measure and ultimately would have accomplished the defendants' purpose."

On appeal, the panel held that although the summary judgment was partial and interlocutory, because damages remained **[**11]** to be adjudicated, nevertheless it had

jurisdiction to review it because the issue of constitutionality was" inextricably bound" up with the injunction.[3] The panel reversed the partial summary judgment.[4] Its holding appears to be that speech by a student in high school can constitutionally be suppressed and punished if the school shows "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[5] The panel treated the expulsion as "trying to protect its students from potential violence," not as "trying to discipline James for his speech."[6]

[12]**

Analysis

The issue in this case is whether the school could punish James for what he said in his poem. The expulsion mechanism used against James is, as is set out below, a form of punishment. It is not unusual to hear some troubled person say things that give rise to the thought, "That person may be mentally ill or emotionally disturbed," and sometimes, "That person ought to be examined to determine whether he poses a danger to himself or others." Those conclusions, even assuming that they are well taken, do not justify punishing the speaker.

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[3] LaVine v. Blaine School District, 257 F.3d 981, 987 (9th Cir. 2001).

[4] *257 F.3d at 992.* In my opinion, the panel had no jurisdiction to reach the merits of the partial summary judgment decision. The panel affirmed the injunction, but reversed the summary judgment on which the injunction was based. If the injunction could be affirmed whether the partial summary judgment was right or wrong, then the partial summary judgment could not properly be deemed "inextricably bound "up with the injunction. That could be so only if the correctness of the partial summary judgment would control whether the injunction could be affirmed.

[5] LaVine, 257 F.3d at 989 (quoting Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)) (internal quotation marks omitted).

[6] *257 F.3d at 991.*

This case does not put at issue whether the school could, consistently with the Constitution, remove James pending psychiatric examination to ensure that he did not pose an unreasonable risk to the safety of other students. The district court only addressed whether the school could **[**13]** punish James with "emergency expulsion" for writing his poem. James's poem is disturbing. Reasonable school officials could have reasonably been concerned, based on **[*724]** his poem, and considering that he had once thought about suicide and experienced various disturbing events in his life, that James was a troubled and depressed boy. And they might have reasonably concluded that he ought to be examined by a psychiatrist before being allowed back into the school or into school events. The school administrators did not read the poem carefully enough to notice when it used the past tense and when it used the future tense, so they misread a dramatic monologue about a crime two years before as a statement that the monologuist intended to commit the crime in the future. Nevertheless, it is of legitimate concern when a boy in high school is preoccupied with thoughts about murder and suicide. Neither the LaVines, nor the district court, nor I, have taken issue with the proposition that James could properly be excluded from the school so that a psychiatrist could examine him and communicate a judgment about when it was safe to readmit him.

Punishment has meaning and consequences distinct from examination, **[**14]** counseling, and exclusion for health or safety reasons based on predictions about future conduct. As the district court proceedings on the injunction make clear, James and his father brought this case in part because the disciplinary expulsion in his school record has kept James from enlisting in the armed services. People are often asked on job and other applications whether they were ever "disciplined" in school, but not whether they were ever removed from school for medical reasons. School nurses commonly send children home when they appear to have

communicable or dangerous medical conditions, such as impetigo, lice, measles, German measles, and chicken pox, and do not allow them to return until a doctor confirms that they are no longer dangerous to others. The Constitution does not permit the government to punish an individual for being ill, regardless of whether his illness is dangerous to others.[7] And the Constitution does not permit the government to punish people for the content of their speech, if it is not a "true threat,"[8] where the punishment is grounded on a prediction based on the speech that the individuals may commit crimes against others. James, though, was not **[**15]** treated like a child with measles, who would likely be referred by his teacher to the school nurse and then sent home until he was better. He was punished, by expulsion, as having broken the rules.

The **[**16]** panel decision creates a new First Amendment rule: where school officials perceive a major social concern about school safety, they may punish school children whose speech gives rise to a concern that they may be dangerous to themselves or others, even though the speech is not a threat, disruptive, defamatory, sexual, or otherwise within any previously recognized category of constitutionally unprotected speech.

The panel muddies the waters by saying that "when the school officials expelled James LaVine they acted with

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[7] See *Robinson v. California, 370 U.S. 660, 666-667, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962)* (holding unconstitutional statute punishing drug addiction); see, generally, *Kansas v. Hendricks, 521 U.S. 346, 361-364, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997)*(contrasting civil commitment with imprisonment for committing a crime). Cf. *Powell v. Texas, 392 U.S. 514, 532-33, 20 L. Ed. 2d 1254, 88 S. Ct. 2145 (1968)* (holding constitutional a criminal statute against public drunkenness).

[8] *Watts v. United States, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969)* (internal quotation marks omitted); see also *NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-29, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982).*

sufficient justification and within constitutional limits, not to punish James for the content of **[*725]** his poem, but to avert perceived potential harm."[9] This is mistaken as fact and law, and the district court was correct in its contrary conclusion. School officials punished James for making a threat. The vice-principal testified he "absolutely" took the poem "as a threat to murder" and "a violation of the disciplinary code." The principal testified that "James did something terribly wrong when he wrote this poem" and that the "poem itself" "violated the Blaine High School Discipline Policy" because it was" a threat." The official letter announcing the expulsion cited **[**17]** James for "violation of the Blaine High School Discipline Policy "and "imposed the sanction of emergency expulsion. "Though mistaken on the record and state law in its assertion that the school "was not trying to discipline James for his speech,"[10] the panel evidently concedes that James's speech was not a "true threat" and was not punishable as such.

The applicable state law governing emergency expulsion establishes that it is punitive. School officials must show that a student poses an "immediate and continuing danger" to himself or others to justify immediate expulsion with a hearing afterwards.[11] The significance of the reference to "immediate and continuing danger" is not that the immediacy of the danger is the basis for expulsion, but rather that it is the basis for not delaying the expulsion until after the hearing.[12] The basis for the expulsion is "misconduct."[13] At

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[9] *LaVine, 257 F.3d at 983.*

[10] *257 F.3d at 991.*

[11] Wash. Admin. Code § 180-40-295 (2001).

[12] Compare Wash. Admin. Code § § 180-40-275, -280, -285 (authorizing expulsion after hearing) with Wash. Admin. Code § § 180-40-295, -300, -305 (authorizing emergency expulsion followed by post-expulsion hearing) (2001). See also Wash. Admin. Code § 180-40-290 (2001) (authorizing emergency removal from class, subject, or activity).

the post-expulsion hearing on an **[**18]** emergency expulsion, the student gets a chance to explain his "alleged misconduct."[14] The determination at the emergency expulsion is "the guilt or innocence of the student."[15]

The panel consigns high schools to a constitutional black hole, where freedom of speech exists only to the extent that administrators are comfortable with it. That is not the law. Tinker v. Des Moines Independent Community School District holds that students "do not shed their constitutional rights to freedom of speech **[**19]** or expression at the schoolhouse gate."[16] Regulations that directly interfere with speech, such as laws against libel, incitement to violence, threats, and obscenity, must fit within narrowly defined exceptions to otherwise absolute First Amendment protection.[17] The nature and purposes of schools, and the fact that their students are generally minors, allows for restraints that do not apply in other contexts,[18] **[*726]** but the general rule remains supportive of freedom of speech.
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[13] Wash. Admin. Code § 180-40-305(2)(d) (2001).

[14] Id.

[15] Wash. Admin. Code § 180-40-305(4) (2001).

[16] *Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969).*

[17] See New York Times Co. v. Sullivan, 376 U.S. 254, 281-83, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)(defamation); Brandenburg v. Ohio, 395 U.S. 444, 447-48, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969)(incitement); Watts, 394 U.S. at 708(threats); Claiborne Hardware, 458 U.S. at 927-29 (same); Roth v. United States, 354 U.S. 476, 485, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) (obscenity).

[18] See, e.g., Bethel School District v. Fraser, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)(upholding punishment of student for indecent speech in school assembly); Hazelwood School District v. Kuhlmeier ,484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988) (upholding censorship of student articles in school-sponsored student newspaper).

The panel purports to draw its rule, that school administrators may punish student speech if they can show" facts which might reasonably have led school officials to forecast substantial disruption of or material interference with school activities," from Tinker.[19] [**21] That reads Tinker through a mirror. Tinker held that it was unconstitutional for the school to suspend students for refusing to take off their black protest armbands.[20] Its importance was to hold that the First Amendment does apply in schools, not that it doesn't.[21] The Court left open the possibility that punishment for refusing to remove the armbands might have been constitutionally permissible if there had been a "finding" and a "showing "that "engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[22] But its holding is not that suppression of speech in some circumstances is permitted, but rather that in the circumstance before the Court it was not constitutionally permitted.

The panel's errors on Tinker are these: (1) Tinker does not hold that a mere prediction that speech may interfere with discipline justifies suppression, it holds only the converse, that suppression is not justified in the absence of such a finding and showing; (2) Tinker does not hold that a student may be punished for speech that, without intentional wrongdoing by the student, may disrupt discipline, but at most implies that, had the armbands been disruptive, the students could have been punished for refusing to obey an order to take them off, that is, to cease engaging in the

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[19] *393 U.S. at 514* (quoted in *LaVine, 257 F.3d at 989).*

[20] *393 U.S. at 514.*

[21] *393 U.S. at 506.*

[22] 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (internal quotation marks omitted).

prohibited expression; (3) Tinker requires a "showing," not a mere prediction based on amorphous concern.

Bethel School District v. Fraser reaffirmed the Tinker principle that "students do not 'shed their constitutional rights to freedom of speech at the schoolhouse gate.'"[23] Bethel held that **[**22]** a school could constitutionally punish a student for giving a lewd speech to a school assembly, after he had been told specifically that he was not permitted to make the speech, and disruption actually did occur (hooting, yelling, graphic sexual gestures among some students, embarrassment and bewilderment among others).[24] Under Bethel, schools may prohibit and punish "a vulgar and lewd speech" such as this one because it undermined the school's "basic educational mission" of teaching, among other things, civility in public discourse.[25]

Hazelwood School District v. Kuhlmeier again reaffirmed that "students in the public schools do not' shed their constitutional rights to freedom of speech or expression **[*727]** at the schoolhouse gate.'"[26] It drew a distinction, though, between "personal **[**23]** expression that happens to occur on the school premises," which is fully protected by Tinker, and "school-sponsored publications . . . and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[27] **[**24]** The principal had excluded some stories from the school newspaper, which was not independently prepared outside the school by students, but

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[23] Bethel School District v. Fraser, 478 U.S. 675, 680, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986) (quoting Tinker, 393 U.S. at 506).

[24] *478 U.S. at 685.*

[25] Id.

[26] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)(quoting Tinker 393 U.S. at 506).

[27] *484 U.S. at 271.*

was prepared under school sponsorship and supervision as part of the journalism curriculum.[28] The Court held that in such a school-sponsored activity, the constitutional test was whether the school's actions regarding content" are reasonably related to legitimate pedagogical concerns."[29] Because James's poem was "personal expression that happens to occur on the school premises," not school sponsored activity, the "reasonably related to legitimate pedagogical concerns" test has no application.

In the absence of any viewpoint discrimination or other disqualifier, perhaps a school could constitutionally punish student personal expression within the school if (1) as in Tinker, Bethel and Hazelwood, the student had clear notice that the speech was prohibited and would be punished, and (2)" disturbances or disorders on the school premises in fact occurred"[30] or the record demonstrated "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[31] I have no doubt that the school could prohibit discussion of poetry in calculus class under such a rule, but am considerably less confident that it could prohibit students from talking to each other during recesses about sex, religion or politics, on the ground that such discussions were likely to lead to hard feelings and disruption. But even under such a rule, James could not be punished, because he did not have notice that his poem would expose him to punishment. **[**25]** At most, the school could, under Tinker, Bethel, and Hazelwood, tell him not to circulate it any more in school, and then punish him if he did.

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[28] *484 U.S. at 267-70.*

[29] *484 U.S. at 273.*

[30] *Tinker, 393 U.S. at 514.*

[31] Id.

The panel opinion suggests that there was nothing else the school could do to exclude James pending psychiatric examination, that it had "only one option," emergency expulsion.[32] That is incorrect, and it would not matter if it were correct. The district judge pointed out that the school could have used "a temporary suspension pending psychiatric examination" to accomplish its legitimate purpose fully. She also pointed out correctly that "the supremacy clause will not allow state legislation to excuse noncompliance with the federal constitution." There can be little doubt that, even if there were not an explicit rule providing for suspensions where students posed risks to others on account of medical conditions, the school had implied authority to exercise the police power for that **[**26]** purpose.[33]

[*728] The panel describes this case as arising "against the backdrop of tragic school shootings"[34] and school officials' knowledge of "shootings at Columbine, Thurston, and Santee high schools."[35] Constitutional law ought to be based on neutral principles, and should not easily sway in the winds of popular concerns, for that would make our liberty a weak reed that swayed in the winds. Nevertheless we do not perform our work in isolation from the society we live in, and there is a notion that permeates the record **[**27]** in this case that because of increased violence in the schools, free speech ought to give way to increased security. Both the diagnosis and the cure are probably wrong, and such constitutional law

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[32] *LaVine, 257 F.3d at 990.*

[33] See *State v. Armstrong, 39 Wn.2d 860, 239 P.2d 545, 548-49 (Wash. 1952)* (university board of regents may refuse admission to student who refuses to get a chest x-ray to rule out tuberculosis, even without a regulation, under its implied authority). Cf. *Jacobson v. Massachusetts, 197 U.S. 11, 37-38, 49 L. Ed. 643, 25 S. Ct. 358 (1905)* (state may require vaccinations under its police power).

[34] *LaVine 257 F.3d at 983.*

[35] *257 F.3d at 987.*

ought not to be based on this vague popular sociology. There may well be, not an increase in school violence, but rather an increase in newspaper, magazine, and television stories about school violence, which has in fact been declining or steady in its frequency.[36] **[**29]** As for the cure, there is no particular reason to think that punishing speech about school violence will reduce the amount of school violence. Though we judges have traditionally explained the value of freedom of speech in terms of the value of having a free marketplace of ideas,[37] those whose profession is psychology and psychiatry rather than law traditionally explain it in terms of what they can learn about a patient if the patient communicates openly. An article in American Psychologist[38] explains that (1) rates of criminal victimization in schools have apparently not risen in the past decade;[39] (2) prediction of violent behavior is exceedingly difficult, because "for every killer youth, there are many others with **[**28]** the same behaviors or attitudes

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[36] The amicus brief cites for this proposition, Kim Brook, Vincent Schiraldi, and Jason Ziedenberg, School House Hype: Two Years Later (Justice Policy Institute and Children's Law Center, April 2000), available at http://www.cjcj.org/jpi/publications.html (arguing that schools remain one of the safest places for children to be and that school violence is declining). See also Lori Dorfman and Vincent Schiraldi, Off Balance: Youth, Race, and Crime in the News (Building Blocks for Youth, April 2001), available at http://www.cjcj.org/jpi/publications.html (discussing research showing a correlation between public perception of crime rates and news reporting).

[37] See, e.g., *Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 390, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969)*("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."); *New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964); Dennis v. United States, 341 U.S. 494, 503, 95 L. Ed. 1137, 71 S. Ct. 857 (1951).*

[38] Edward P. Mulvey and Elizabeth Cauffman, The Inherent Limits of Predicting School Violence, 56 American Psychologist 797 (2001).

[39] Id. at 797.

who never come close to killing their classmates";[40] (3) "the ratio of false positives to false negatives matters greatly if all identified individuals are stigmatized or if their opportunities are limited";[41] (4) youths who engage in violent behavior "are not usually loners";[42] (5) both diagnosis and interventions for violence-prone adolescents **[*729]** are not well developed;[43] (6) for risk assessment, "the best source of information about the activities of students in a school is other students";[44] (7) expulsion dries up information, because "students will withhold information from the administration to avoid such disproportionate punishments."[45]

I do not cite this article to suggest that constitutional law ought to be based on this sociological and psychological basis instead of the basis to which the panel gave some deference, that expulsion for speech not amounting to a "true threat" will reduce school **[**30]** violence. My purpose is to show that there is not necessarily any trade-off between speech and security. Suppression of speech may reduce security as well as liberty. Allowing the school to punish a student for writing a poem about a school killer may foster school killings, by drying up information from students about their own and other students' emotional troubles. If the students don't talk, the administrators and medical professionals won't find out about problems that speech might reveal. Punishment based on prediction rather than misconduct tends to be unjust, and where the predicted event is extremely rare, as in-school murders are, predictive punishment such as the school imposed is likely to punish

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[40] Id. at 797-98.

[41] Id. at 798.

[42] Id.

[43] Id. at 799.

[44] Id. at 800.

[45] Id.

vast numbers of innocent people for every one who would have engaged in the feared misconduct.[46] **[**31]**

What was threatening about James's poem was not the words but the writer. The fact that he wrote the poem, given his background, might have indicated that he was so emotionally distraught that he might hurt himself and others. The fact that James wrote the poem might reasonably have justified a temporary suspension for mental examination, which was done, and which ascertained after three psychiatric visits that he could safely return to school. But the fact that James's poem might have revealed his emotional condition did not constitutionally justify punishing him.

Not everyone who writes about murder and evil is an incipient murderer. There is a lot of art about homicide (e.g., the folk songs "On the Banks of the Ohio"[47] and "Tom Dooley,"[48] Dostoevski's Crime and Punishment[49]) and about

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[46] Cf. *Gonzalez v. Metropolitan Transportation Authority, 174 F.3d 1016, 1023 (9th Cir. 1999)*(noting that false positives are more likely to outnumber true positives to the extent that what is tested for is rare in the population tested).

[47] "I asked my love to take a walk,
Just a little way's with me.
An' as we walked,
Then we would talk
All about our wedding day.

"I took her by her pretty white hand,
I led her down the banks of sand,
I plunged her in
Where she would drown,
An' watched her as she floated down."

[48] "I met her on the mountain,
There I took her life.
Met her on the mountain,
Stabbed her with my knife."

[49] Fyodor Dostoevsky, Crime and Punishment (Constance Garnett, trans., Bantam Classics, reissue edition 1984) (1912).

homicidal maniacs who commit mass murder (e.g., Taxi Driver[50]). This art sometimes inspires crime (e.g., John Hinckley shooting President Reagan to impress Jodie Foster's character in Taxi Driver). But the government could not properly punish Robert DeNiro for acting in Taxi Driver, nor the **[*730]** Kingston Trio for performing "Tom Dooley,"[51] no matter how many people **[**32]** found these artworks disturbing or threatening. We do not, under our constitution, allow the government to punish artists for making art, whether the art is good or bad, whether it makes people feel good or bad, unless the expression falls within a well established category of unprotected speech. This right too does not end at the schoolhouse gate. **[**33]**

APPENDIX

Last Words

by James LaVine

As each day passed,
I watched,
love sprout, from the most,
unlikely places,
wich[52] reminds,
me that,
beauty is in the eye's,
of the beholder.

As I remember,

---

[50] Taxi Driver (Columbia/Tristar Studios 1976).

[51] The Kingston Trio, "Tom Dooley" on Tom Dooley (EMI/Capitol Special Products 1994).

[52] All typographical errors are James Lavine's.

I start to cry,
for I,
had leared,
this to late,
and now,
I must spend,
each day,
alone,
alone for supper,
alone at night,
alone at death.

Death I feel,
crawlling down,
my neck at,
every turn,
and so,
now I know,
what I must do.

I pulled my gun,
from its case,
and began to load it.

I remember,
thinking at least I won't,
go alone,
as I,
jumped in,
the car,
all I could think about,
was I would not,
go alone.

As I walked,
through the,
now empty halls,

I could feel,
my hart pounding.

As I approached,
the classroom door,
I drew my gun and,
threw open the door,
Bang, Bang, Bang, Bang.

When it was all over,
28 were,
dead, and all I remember,
was not felling,
any remorce,
for I felt,
I was,
clensing my soul,

I quickly,
turned and ran,
as the bell rang,
all I could here,
were screams,
screams of co workers,
and just plan,
screams of shear horror,
as the students,
found their, [**34]
slayen classmates.

2 years have passed,
and now I lay,
29 roses,
down upon,
these stairs,
as now,
I feel,

I may,
strike again.

No tears,
shall be shead,
[*731] in sarrow,
for I am,
alone,
and now,
I hope,
I can feel,
remorse,
for what I did,
without a shed,
of tears,
for no tear,
shall fall, from your face,
but from mine,
as I try,
to rest in peace,
Bang!

BRUCE LAVINE, as next friend of JAMES LAVINE, Plaintiffs, v. BLAINE SCHOOL DISTRICT, a municipal corporation, TIM HANEY, DAN NEWELL, KAREN MULHOLLAND, Defendants.

NO. C99-1074R

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2000 U.S. Dist. LEXIS 18989

February 24, 2000, Decided

February 24, 2000, Entered

DISPOSITION:

[*1] Plaintiffs' motion for partial summary judgment [docket 16-1] GRANTED, and defendants' motion for partial summary judgment [docket 41-2] DENIED.

COUNSEL:

For BRUCE LAVINE, JAMES LAVINE, plaintiffs: Breean Lawrence Beggs, BRETT & DAUGERT, BELLINGHAM, WA.

For BLAINE SCHOOL DISTRICT, TIM HANEY, DAN NEWELL, KAREN MULHOLLAND, defendants: Michael Alexander Patterson, Charles P E Leitch, LEE, SMART, COOK, MARTIN & PATTERSON, Tyna Lee Ek, MERRICK, HOFSTEDT & LINDSEY, SEATTLE, WA.

For BLAINE SCHOOL DISTRICT, TIM HANEY, DAN NEWELL, KAREN MULHOLLAND, counter-claimants: Michael Alexander Patterson, Charles P E Leitch, LEE, SMART, COOK, MARTIN & PATTERSON, SEATTLE, WA.

For BRUCE LAVINE, JAMES LAVINE, counter-defendants: Breean Lawrence Beggs, BRETT & DAUGERT, BELLINGHAM, WA.

OPINION BY:
BARBARA JACOBS ROTHSTEIN, UNITED STATES DISTRICT JUDGE.

OPINION:

ORDER GRANTING PLAINTIFFS' SUMMARY JUDGMENT MOTION AND DENYING DEFENDANTS' SUMMARY JUDGMENT MOTION

THIS MATTER comes before the court on a motion for partial summary judgment by plaintiffs Bruce and James LaVine (hereinafter "LaVines"), in response to which defendants Blaine School District (hereinafter the "District"), **[*2]** Tim Haney, Dan Newell, and Karen Mulholland (hereinafter the "School Administrators" unless individually identified) filed a cross motion for summary judgment. The parties seek a ruling as to whether it was unconstitutional to subject James LaVine to an emergency expulsion after receipt of an unsolicited poem on the topic of school violence (hereinafter "Last Words"). Now having reviewed the pleadings filed by the parties, along with the relevant files, the court finds and concludes as follows:

I. BACKGROUND

The following facts are not in dispute. In 1998, James LaVine was an eleventh grade student at Blaine High School, and a member of Vivian Bleecker's sixth period English class. On October 2, 1998, as her class was letting out for the day and students were handing in a homework assignment, James LaVine submitted to Ms. Bleecker the "Last Words" poem. As he handed the poem to her, he asked her if she would read it and tell him what she thought. "Last Words" was not an assigned project, but was an extracurricular effort by James LaVine. Such extracurricular work generally was not out of the ordinary. He turned in the poem along with that day's assignment, as well as a few other **[*3]** assignments that he had missed due to recent absence.

Ms. Bleecker read "Last Words" later that evening. She was troubled by the poem's content and subject matter, and decided that she should discuss the poem with the school counselor, Karen Mulholland. She was able to speak to Ms. Mulholland on October 3, 1998, and told her of "Last Words'" content. Ms. Mulholland was similarly concerned about the poem, and arranged to meet with Ms. Bleecker at school that evening. Tim Haney, the school's Vice Principal, was also called to attend that evening meeting, and was shown the poem at that time. The LaVines were not made aware of, nor invited to, the meeting. Mr. Haney did contact James LaVine at home to confirm that James had no intention of attending a school dance scheduled for that night.

After the October 3 meeting, the School Administrators decided to call local law enforcement and inform them of their concerns. The Whatcom County Sheriff's Department eventually dispatched a number of deputies to the LaVine household. There, they reviewed "Last Words," interviewed James LaVine, and contacted Dr. Charles DeWitt, a licensed psychologist with the Whatcom County Department of Mental Health. **[*4]** Dr. DeWitt informed them that "on a

more probable than not basis . . . there were insufficient grounds for anyone to make a determination that James LaVine was in imminent danger of causing serious harm to himself or others." DeWitt Decl. at 2. After they received this information from Dr. DeWitt and completed their investigation, the Sheriff's deputies determined that there was no immediate threat posed nor cause for further action.

On October 4, 1998, Mr. Haney met with Blaine High School Principal Dan Newell. He and Mr. Newell apparently discussed James LaVine's background, and eventually determined that the situation constituted an emergency such that James LaVine should be expelled immediately. Mr. Haney left a telephone message for the LaVines requesting that they attend a meeting at school on October 5, 1998, but did not otherwise inform them of his concerns. At that October 5 meeting, the LaVines were first told of the alarm raised by "Last Words," and were then informed that James had been expelled on an emergency basis for violation of the District's disciplinary code. There was no discussion of the poem's content or other dialogue pertaining to its meaning. This expulsion **[*5]** was formally expressed in a letter of the same date.

The parties later arranged to have James LaVine examined by a psychiatrist, Dr. Watson, in order to assess his mental state and possible return to school. On October 26, 1998, Dr. Watson examined James LaVine and stated that while he would have recommended that James be removed from school pending further evaluation, had he been consulted at the time the original decision was made, his ultimate conclusion was that James LaVine was fit to return to school. The District rescinded the emergency expulsion, James LaVine returned to school, and he completed the year without further incident.

The LaVines went on to appeal the expulsion to the Blaine School Board. A hearing was held on December 15,

1998. The School Board affirmed Principal Newell's decision to expel James LaVine from school, but suggested as an accommodation of the LaVines' concerns that a new letter be prepared for James' file. That letter was back-dated to October 5, 1998, and emphasized that James was expelled for safety rather than disciplinary reasons. The LaVines brought this suit claiming that James LaVine was expelled for violation of the District's disciplinary [*6] code, and that the code and its enforcement infringed on his First Amendment right to free speech. The LaVines are seeking actual and special damages, and an order enjoining the District or its agents from maintaining any negative documentation of this event in James LaVine's file.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a summary judgment motion, the court must view all facts and inferences therefrom in the light most favorable to the non-moving party. See *Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).* The party moving for summary judgment must make a showing sufficient for the court to conclude that no reasonable trier of fact could find in favor of the nonmoving party. *Celotex v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* In this case the parties agree on the relevant facts, [*7] but disagree on the legal and constitutional conclusions to be drawn from those facts.

B. First Amendment Analysis

Integral to the personal liberties secured by the Bill of Rights is the First Amendment's protection of free speech. In

analyzing the First Amendment strictures applicable in the special environment of the American schoolhouse, the United States Supreme Court has repeatedly held that both teachers and students retain their Constitutional rights to freedom of speech and expression. See, e.g., *Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969).* Poetry is one of the classical means for artistic expression of the content of one's mind, and as such, falls within the core speech protected by the Constitution.

Nevertheless, the defendants argue that their restriction on James LaVine's speech was justified and that "Last Words" was not entitled to First Amendment protection because "Last Words" constituted a threat of physical violence and disruption of the safe operation of the school. The LaVines dispute that characterization and maintain that "Last Words" was not a threat of any kind. The **[*8]** LaVine's further argue that the District's actions were not narrowly tailored to achieve its legitimate interest in the safety of the school's personnel.

It is undisputed that the District's expulsion of James LaVine was motivated by the message contained in "Last Words." He was not disciplined for the context in which he delivered his poem, but explicitly and solely for the evocative nature of his poem. There is also no question that the defendants have a compelling interest in ensuring the safety of the students and staff of Blaine High School. As will be shown below, however, the District's actions were not sufficiently refined to achieve their permissible goals and infringed on James LaVine's First Amendment freedom of speech.

1. "Last Words" as a threat

Defendants argue that "Last Words" was not subject to First Amendment protection because it constituted a direct threat of physical violence towards school personnel and/or

the student body. It is true that such actual threats made in the school context are not speech embraced by the First Amendment. *Lovell v. Poway Unified School Dist., 90 F.3d 367, 371 (9th Cir. 1996)* (citing *Watts v. United States, 394 U.S. 705, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969))*. **[*9]**

The question whether a given communication amounts to a true threat of physical violence is answered through an objective "reasonable person" analysis. *90 F.3d at 372.* A statement is a threat, and not protected speech, if a "reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." Id. (internal citation omitted). For such speech to lose its protected status, the threat must be "so unequivocal, unconditional, immediate and specific . . . as to convey a gravity of purpose and imminent prospect of execution." Id. (quoting *United States v. Kelner, 534 F.2d 1020 (2nd Cir. 1976))*.

Although the District need not wait until the school experiences an actual disturbance before taking corrective action, *Chandler v. McMinnville School Dist., 978 F.2d 524 (9th Cir. 1992),* neither may it preemptively silence a student unless a reasonable person under similar circumstances would conclude that the poem constitutes a true threat of physical violence. Cf. *Lovell, 90 F.3d at 372.* That is not the case here. To the contrary, **[*10]** the record presented permits no finding other than that "Last Words" was not a sincere expression of intent to harm or assault, and the poem therefore falls squarely within the purview of the First Amendment's core protections.

In order to reach the conclusion that the District was not acting reasonably when it deemed the poem to be a threat, the court has reviewed "Last Words" and considered it in light of the factual circumstances as they existed in October of 1998. First, James LaVine handed the poem to his English teacher

as he submitted other assigned work. As he did so, he mentioned to his teacher that he had written a poem, and that he would appreciate hearing what she thought of it. Bleecker Decl. at P 2; Leitch Decl., Exh. 1 at 8:6-21. There was no overt action, violent demeanor, or other threatening behavior manifested by James LaVine, and Ms. Bleecker avers that she was not concerned about anyone's safety until after she arrived home and reviewed "Last Words." Bleecker Decl. at P 4, 5. Even then, her sole concern was for James LaVine's well-being, not for her own. Id. at 5; Leitch Decl., Exh. 1 at 14:14-15:8. Similarly, the Whatcom County Sheriff's Department and Dr. [*11] DeWitt, a mental health professional consulted at the time, found no evidence of a threat and no cause for further action. Parkhurst Decl., Exh. B at 2; DeWitt Decl. at 2.

The School Administrators nevertheless argue that it was the combined impact of "Last Words'" content and James LaVine's personal history that led them to the reasonable conclusion that the poem constituted a cognizable threat. In support of this argument, the defendants point to: 1) the domestic violence complaint lodged against James' father Bruce LaVine; 2) James LaVine's "history of suicidal ideation;"[1] n1 3) one prior incident of fighting; and 4) concerns expressed by another student's mother about James LaVine's demeanor toward her daughter. None of these other factors could reasonably have caused the District to expel James LaVine. This is especially true since the School Administrators further admit that, without reliance on any of these other factors, they would have done precisely the same thing to any other student based on the poem alone. Leitch Decl., Exh. 1 at 54:4-25, 83:13-84:25.

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[1] Suicidal ideation is a far cry from threatened violence and is hardly uncommon among teen-aged persons. Anyone truly concerned with James LaVine's mental health should have known that emergency expulsion of such a student would not be constructive.

[*12]

2. The District's reaction was not narrowly tailored

Even if the District's concern about the poem was reasonable, the District's reaction went well beyond that which was permissible under the circumstances. There were far less restrictive ways to ensure the safety of students and school personnel. A temporary suspension pending psychiatric examination would have been a far less drastic measure and ultimately would have accomplished the defendants' purpose. After the emergency expulsion, the LaVines arranged for James to undergo a psychiatric examination. As a result of that evaluation, examining psychiatrist Dr. Watson agreed that he would have had James LaVine removed from school pending further evaluation, but proceeded to certify James' fitness to return to school. That conclusion confirmed that of psychologist Dr. DeWitt, who had reviewed "Last Words" after being contacted by Ms. Mulholland and then by Whatcom County Sheriff's Deputies on October 3, 1998. The court concludes that the District's initial expulsion without follow up investigation was not narrowly tailored to serve its interest in preserving and promoting school safety.

Following the psychiatric examination, **[*13]** James LaVine returned to school without any ensuing problems. Nevertheless, the District is now insisting on maintaining documentation of this incident in James LaVine's file in spite of the fact that the expulsion order was rescinded, and in spite of the fact that such documentation will indelibly mar James LaVine's educational record and reputation. The court concludes that forever saddling James LaVine with the baggage flowing from an expulsion of dubious constitutional validity serves no governmental interest at all, while James LaVine may be precluded from pursuing future career opportunities as a result of this incident. The defendants' intrusion on free speech as a means of achieving a

compelling governmental interest must be narrowly tailored, and the District's decision to maintain negative documentation in James LaVine's file is far too removed from its legitimate safety concerns to be constitutionally justified.

C. The Washington Administrative Code

The defendants have also argued that, according to the Washington Administrative Code (hereinafter the "WAC"), the District had the "right and duty" to expel James LaVine on an emergency basis. That WAC provision does **[*14]** allow for emergency expulsion, provided that the school official "has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process." WAC 180-40-305.

It appears that the two enumerated grounds provided for in the WAC are substantially equivalent to the requisite inquiry under First Amendment jurisprudence. The first analysis is whether "Last Words" evidenced an immediate and actual threat of harm, and the second is whether it threatened to materially interfere with the orderly operation of the educational system. Both questions have heretofore been answered in the negative, and the WAC cannot vindicate the District's decision. [2]
[*15]

---

[2] From a structural standpoint, it is also worth noting that the Supremacy Clause will not allow State legislation to excuse noncompliance with the federal Constitution. To the extent that the defendants' actions infringed on James LaVine's First Amendment rights, the WAC is of little significance.

III. CONCLUSION

Based on the foregoing, the court finds that the District exceeded the limitations imposed by the First Amendment, and that the LaVines are entitled to partial summary judgment. Because the expulsion order has been lifted, the injury has been at least partly remedied. However, the LaVines are entitled to the equitable remedy of an injunction preventing the placement or maintenance of any negative documentation of this incident in James LaVine's school file. The issue of damages, if any, shall be determined in later proceedings. Now, therefore, plaintiffs' motion for partial summary judgment [docket 16-1] is GRANTED, and defendants' motion for partial summary judgment [docket 41-2] is DENIED.

DATED at Seattle, Washington this 24th day of February, 2000.

BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT JUDGE

Last Words
by James LaVine

As each day passed,
I watched,
love sprout,
from the most,
unlikly places,
wich reminds,
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Death I feel,
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I pulled my gun,
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and began to load it.

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thinking at least I won't,
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as I,
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the car,
all I could think about,
was I would not,
go alone.

As I walked,
through the,
now empty halls,
I could feel,
my hart pounding.

As I approached,
the classroom door,
I drew my gun and,
threw open the door,
Bang, Bang, Bang, Bang.

When it was all over,
28 were,
dead,
and all I remember,
was not felling,
any remorce,
for I felt,
I was,
clensing my soul,

I quickly,
turned and ran,
as the bell rang,
all I could here,
were screams,

screams of friends,
screams of co workers,
and just plain,
screams of shear horor,
as the students,
found their,
slayen classmates.

2 years have passed,
and now I lay,
29 roses,
down upon,
these stairs,
as now,
I feel,
I may,
strike again.

No tears,
shall be shead,
in sarrow,
for I am,
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and now,
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remorce,
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without a shed,
of tears,
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from your face,
but from mine,
as I try,
to rest in peace,
Bang!

Supreme Court U.S.
FILED
MAY 31 2002
OFFICE OF THE CLERK

No. 01-1604

IN THE

Supreme Court of the United States

BRUCE LAVINE, as next friend of James Lavine,

Petitioner,

v.

BLAINE SCHOOL DISTRICT, a municipal corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner does not accurately reflect who made the decision to expel high school student James LaVine, the panoply of concerns that led to his emergency safety expulsion, or the administrative procedure utilized for his emergency expulsion and subsequent reentry into school. All three are necessary to an understanding of why the core dispute in this case is largely semantic, with the parties agreeing that James' removal from school pending a psychological evaluation was appropriate, but arguing over whether this removal should have been termed a "suspension" or an "emergency expulsion." This semantic dispute is too inherently tied to Washington administrative regulations to warrant review by the U.S. Supreme Court.

James LaVine did not receive a disciplinary expulsion from Blaine High School, but rather was temporarily removed from school under an emergency safety expulsion procedure after he displayed many signs of dangerous mental instability and he refused to voluntarily consent to a psychological evaluation. Unlike a disciplinary suspension in which the student is removed from school for a predetermined length of time, an emergency expulsion continues just until the safety concern is addressed, as in this case when it was revoked immediately upon receipt of an opinion by a mental health professional that it was safe to allow James to return to school.

Petitioner suggests that James LaVine was expelled in an effort to discipline him for the content of the violent poem that he submitted to his English teacher, Vivian Bleeker. In forwarding this assertion, the LaVines have incorrectly stated a number of facts. First, the record does not support

Petitioner's claim that Vivian Bleeker "invited her students to turn in personal writings for her review." Petition at 4. James LaVine's poem titled "Last Words" was not part of a classroom assignment, the class was not studying poetry or creative writing, and Vivian Bleeker did not offer extra credit in her class. Second, although Ms. Bleeker did not initially consider the poem to be a direct personal threat to her, she was concerned that James might hurt himself and did not know whether he might come to school with a gun and shoot others as he vividly described himself doing in "Last Words." That is the reason she contacted the school counselor, who knew James better.

Karen Mulholland, the school counselor, was alarmed by the poem, as were Principal Newell and Vice-principal Haney, who were contacted over the weekend to address this emergent situation. The poem so alarmed the school administrators and counselor because of their knowledge of James' history. The entire factual context was taken into consideration by Principal Newell when he made the decision, following consultation with the Vice Principal, school counselor and teacher, to emergency expel James LaVine until he received assurance that James was not at serious risk of harming himself or others.

In deciding how to address the safety concerns raised by James' poem in the full context of his recent behavior, the school administrators considered a myriad of specific factors in James' background, including the following:

- James had previously confided to the school counselor his suicidal feelings and remained on a suicide watch list at the school;

- James, in the school counselor's view, was battling on-going depression and was "seething";

- James had been involved in a fight on school grounds in which he had been seen mercilessly kicking another student who was lying helplessly on the ground;

- James' girlfriend had recently ended their relationship, and her parents had complained to the school administration three days before his submission of the poem that James had been stalking their daughter;

- James confided to the school counselor that he had an altercation with his father a few weeks earlier, that James had reported his father to the police, that a no-contact order had been issued and his mother had made James leave the family home as a result, that his father was to be tried for criminal assault and James was to be called as a prosecution witness, and that James was hurt, angry and feeling a lot of family pressure.

- At the time the decision to expel was made, the school did not know the outcome of James' father's criminal trial or James' feelings about his participation in the process. James was absent from school the three days immediately preceding his submission of the poem during last period on Friday, October 2, 1998.

- James submitted his poem four to six months after a string of school shootings that received heavy media attention, including a much-publicized case in nearby Springfield, Oregon in which Kip Kinkel shot and killed two students and his parents who were teachers, and injured many others.

The high school principal, vice-principal, school counselor and James' English teacher met and discussed the situation over the weekend. Contemporaneous notes taken during those meetings confirmed that the school administrators' and faculty's concern was in assessing James' risk of suicide or violence toward others. They contacted the local police for advice, who referred them to the Washington State Department of Child Protective Services, which in turn referred them to the Mental Health Crisis Line, which eventually put them in contact with a county designated psychologist, Charles DeWitt, Ph.D. After reviewing the poem "Last Words," in which James graphically describes himself shooting 28 people in his class then killing himself, and briefly discussing James LaVine's background with the school counselor, Dr. DeWitt advised law enforcement officials to pick James up for an immediate psychiatric evaluation.

Sheriff deputies found James at his home, and interviewed him about the situation. Contrary to the literary explanation of his reasons for writing the poem coined for summary judgment, James initially was unable to explain why he had written the poem. He said he frequently wrote poetry, but had never before written poetry with a similarly violent theme. At his deposition, James denied thinking about the recently publicized school shootings when he was writing the poem,

and described the material as just flowing out of him. James admitted that even he was quite disturbed at first by the violence described in the poem, particularly because he did not know what had motivated him to write this violent poem. James told the sheriff deputies that he was unwilling to voluntarily consent to a psychological evaluation, and Dr. DeWitt concluded there was insufficient evidence to compel an involuntary psychiatric commitment.

Considering the totality of the circumstances, and the LaVine family's unwillingness to voluntarily submit James for a professional evaluation of the danger that he posed to himself or others, Principal Newell decided that the risk to James and the students and faculty was too great to accept. James and his parents were notified in person and in writing on Monday, October 5, 1998 that James was subject to "EMERGENCY EXPULSION" for behavior that was "significant enough to be classified as dangerous to your son and/or a threat to other students and/or a threat of serious disruption to the education process;" in other words, an emergency safety expulsion under Wash. Admin. Code § 180-40-295.

The LaVine family challenged Principal Newell's decision, and asked for a hearing before the district school board in accordance with Washington administrative procedure. Notably, the LaVines did not challenge the emergency expulsion at the school board hearing, but objected to the wording of the letter of expulsion because they argued that someone who reviewed James' file could misinterpret the letter as indicative of a disciplinary expulsion rather than a safety expulsion because the letter used the word "sanction." The School Board upheld Principal Newell's decision to emergency expel James LaVine pending an evaluation to assure that his presence at school did not pose an unreasonable

danger to himself or others, but as an accommodation to the parents' concerns, ordered that the letter of expulsion be revised to unquestionably indicate that the expulsion was solely for safety concerns.

The school district advised the LaVines that James could return to school as soon as the district received assurance that James' presence at school did not pose a danger to himself or others. The district suggested that one way to satisfy its safety concerns was to consent to an evaluation by a qualified psychiatrist, and the district offered to pay for the evaluation. Dr. Robert Watson evaluated James LaVine, and after three sessions concluded that James was safe to return to school. Dr. Watson testified, in pertinent part, as follows:

> It is my opinion that, in early October, 1998, the Blaine School District could not safely predict that James Lavine would not hurt anyone or act violently in the school setting.
>
> I am of the opinion that in early October, 1998, the circumstances clearly indicated that James Lavine needed to be evaluated and I would have recommended that he be removed from the school setting pending such an evaluation.
>
> During my sessions with James, I found him to be rageful, reactionary, impulsive, and unpredictable. It is my recollection that he walked out of the first session and was very angry. It was only until I completed a third session with James and I felt that he was starting to communicate with me and

> his parents that I found that I could recommend his return to school with a professional opinion that it would be safe.

(ER 333-34).

The Ninth Circuit concluded there was no First Amendment violation because Principal Newell and the Blaine School District had not sought to punish James for the content of his poem, but rather acted out of concern that James posed a danger to himself or others — a concern that was reasonable under the totality of the circumstances. The Ninth Circuit held that neither the First Amendment, nor the U.S. Supreme Court cases that have interpreted the First Amendment in a school context, require a school administrator to refrain from acting to prevent school violence until there is sufficient proof to satisfy the standard for an involuntarily psychiatric commitment.[1] There was overwhelming, undisputed evidence that Principal Newell and the School Board considered a myriad of factors about James LaVine in addition to the poem itself, and that these factors taken as a whole raised a legitimate safety concern justifying removal from school pending a psychological evaluation. The School District's intent to protect James and the student body was further substantiated by the District authorizing James to return to school as soon as the evaluating psychiatrist said that it was safe for him to do so.

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1. The Ninth Circuit noted that under Washington law, a teenager may not be involuntarily committed for psychiatric evaluation unless a mental health professional concludes that the teenager is suffering from a mental disorder and presents a likelihood of serious harm. *LaVine v. Blaine School District*, 257 F.3d at 990, referencing Wash. Rev. Code § 71.34.050.

REASONS FOR DENYING THE WRIT

A. The Only Mechanism In Washington For Immediately Removing A Student From School For Safety Concerns Is Through The Emergency Expulsion Procedure Used In This Case

The distinction under Washington law between a disciplinary suspension or expulsion, and an emergency safety expulsion, is critical to understanding why the Blaine School District had only one procedural mechanism for immediately removing James LaVine from school pending a psychological evaluation, and why the semantic dispute in this case is unworthy of Supreme Court review. In Washington, removing a student from school for disciplinary reasons may be done through suspension or expulsion. A suspension must be for a predetermined length of time, with suspension for 10 days or less falling under the procedural requirements for a "short-term suspension," and suspension for more than 10 days subject to the requirements for a "long-term suspension." Wash. Admin. Code § 180-40-205, § 180-40-245 and § 180-40-260. The disciplinary tool selected, and the length of any suspension, must be justified by the nature of the student's proscribed misconduct.

A disciplinary suspension or expulsion in Washington requires advance notice to the student and parents, and therefore is not suited to an emergent situation. *See* Wash. Admin. Code § 180-40-250, § 180-40-265 and § 180-40-280. In contrast, the emergency expulsion procedure was adopted specifically to address emergent safety concerns at school, and allows an administrator to expel a student without prior notice so long as the administrator:

> has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel or an immediate and continuing threat of substantial disruption of the educational process.

Wash. Admin. Code § 180-40-295.

The LaVines have conceded in their Petition that "[n]o one denies that school officials could have temporarily removed James from school pending a psychiatric evaluation to ensure that he did not pose an unreasonable risk of harm." Petition at 18. This is precisely what was done in this case. The District Court's and the LaVines' suggestion that a temporary suspension rather than expulsion would have been the appropriate response to the school administrators' safety concerns demonstrates misunderstanding of the procedures available to a school under Washington law. As the Ninth Circuit specifically noted in its decision, an emergency safety expulsion is the only procedural mechanism available to a public school in Washington for immediately removing a student from school for an emergent safety concern. *See LaVine v. Blaine School District*, 257 F.3d at 990. Unlike a suspension which lasts for a predetermined number of days, a safety expulsion may be revoked as soon as the safety concern is addressed. Because an emergency expulsion is inherently tied to the duration of the safety concern, it is the least restrictive alternative.

The LaVines admit that Blaine School District had the right to remove James LaVine from school pending a psychological evaluation, but merely argue that this removal should have been termed a "temporary suspension" rather

than a "safety expulsion." This type of semantic dispute arising from the unique regulatory framework of Washington State does not warrant Supreme Court review.

B. The Ninth Circuit Decision Is Consistent With Federal Authority

The Ninth Circuit decided this case based on an analysis under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). *See LaVine v. Blaine School District*, 257 F.3d 981, 989-92 (9th Cir. 2001). The LaVines agree that *Tinker* controls, but argue that the Ninth Circuit misapplied the *Tinker* standard to the facts of this case. A writ of certiorari is rarely granted when the alleged error is the misapplication of the proper legal standard to the facts of a particular case. *See* Supreme Court Rule 10.

The LaVines argue that the Ninth Circuit misapplied *Tinker* in this case because the poem was not a "true threat," and there was insufficient likelihood of disruption of school activities to justify "punishment."[2] Petition at 16-17. Whether or not "Last Words" was a true threat is subject to interpretation. Threats come in many forms, and "the fact that a threat is subtle does not make it less of a threat." *United States v. Orozco-Santillan*, 903 F.2d 1262, 1264 (9th Cir. 1990), *quoting United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989). However, whether or not "Last Words" was a true threat is unimportant to the Court's decision of whether to

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2. Although the LaVines continue to use the word "punishment" to describe James' emergency expulsion, now that they have admitted it was appropriate for the school district to temporarily remove James from school pending a psychological evaluation, it is unclear what about the emergency expulsion was objectionable to the LaVines.

grant the petition, because the Ninth Circuit did not reach this issue. If it had, then a *Tinker* analysis would have been unnecessary because true threats are not protected by the First Amendment. *See Watts v. U.S.*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). The Ninth Circuit concluded that even assuming the poem was not a true threat, the school district's actions were justified under a *Tinker* analysis. *LaVine v. Blaine School District*, 257 F.3d at 989, n.5.

Tinker held that the First Amendment rights of a student must be applied "in light of the special characteristics of the school environment," and recognized the countervailing "rights of other students to be secure and to be let alone." *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 506, 508. Public school administrators have a duty to protect the safety of their students and teachers, and a balancing of rights is necessary whenever a Free Speech versus school violence issue arises.

The LaVines argue that the poem did not meet the *Tinker* standard because the poem "did not provide any basis for predicting that James would harm those at school." Petition at 17. The flaw in the LaVines' reasoning is their insistence that the poem be analyzed in isolation from the surrounding circumstances. The Ninth Circuit appropriately looked to "the totality of the relevant facts . . . all of the circumstances confronting the school officials that might reasonably portend disruption." *LaVine v. Blaine School District*, 257 F.3d at 989, citing *Karp v. Becken*, 477 F.2d 171, 174-75 (9th Cir. 1973). Following a very case specific analysis under *Tinker*, and the backdrop of recent school shootings, the Ninth Circuit concluded that school authorities "reasonably . . . forecast substantial disruption of or material interference with school activities — specifically, that James was intending to inflict injury upon himself or others." *LaVine v. Blaine School*

District, 257 F.3d at 990. The Ninth Circuit held that *Tinker* does not require school administrators to wait until disruption actually occurs before they may act. *LaVine v. Blaine School District*, 257 F.3d at 989.

The LaVines do not argue with the case law applied by the Ninth Circuit, and do not point out any U.S Supreme Court case or federal circuit opinion in direct conflict with the Ninth Circuit decision. They argue merely that this Court should take this opportunity to reaffirm its opinion in *Tinker*, and to clarify a perceived inconsistency among various lower federal courts concerning whether or not *Tinker* calls for the application of a "rational basis test." Petition at 19-22. This Court need not grant certiorari to reaffirm an earlier decision when there are no federal appellate court decisions in conflict with the prior decision. Moreover, the perceived inconsistency in application by lower federal courts is a misperception by the LaVines. A so-called rational basis test is not inconsistent with *Tinker*, so long as the court involved examines the reasonableness of the school official's conclusion that the factual circumstances "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *See Tinker v. Des Moines Independent Community School District*, 393 U.S. at 514.

None of the cases relied upon by the LaVines in support of their argument that some federal courts have begun to apply a standard contrary to *Tinker* involved a school violence risk assessment. *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989) involved rude comments made by a student in a campaign speech during a school assembly. This case did not even involve a *Tinker* analysis, but rather was appropriately analyzed under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988).

Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987) involved an examination of school policies concerning the content of printed materials that students would be allowed to distribute on campus. Contrary to the LaVines' conclusion that the Eighth Circuit deviated from the *Tinker* standard, the *Bystrom* court specifically held:

> We believe that the defendants' guidelines comply with *Tinker*. Much more than undifferentiated fear or apprehension is required here. School authorities must, instead, find the existence of specific facts upon which the likelihood of disruption can be forecast, and the guidelines even go on to list examples of such fact.

Bystrom v. Fridley High School, 822 F.2d at 754.

The two T-shirt cases relied upon by the LaVines are clearly inapposite. *See Baxter v. Vigo County School Corp*, 26 F.3d 728 (7th Cir. 1994) and *Gano v. School District No. 411 of Twin Falls County*, 674 F. Supp. 796 (D. Idaho 1987). Neither involved a school violence issue, and both were decided on completely different grounds than those at issue in this case. Baxter involved an elementary school student. Due to the young age of the student, it was determined that the student's rights were not "clearly established," and qualified immunity of the administrator justified dismissal. In *Gano*, a preliminary injunction was denied based on a low likelihood of success on appeal when no actual speech issue could be identified from the T-shirt depicting caricatures of the school administrators in a drunken state.

CONCLUSION

The LaVines have failed to show a compelling reason for review by the Supreme Court. They have not shown that the Ninth Circuit or other federal courts have strayed from the standard set down by this Court in *Tinker*, but merely do not agree with the manner in which the Ninth Circuit applied the balancing test of *Tinker* to the facts in this case. The LaVines do not dispute James' removal from school pending a psychological evaluation — all that was done in this case — but argue that the removal should have been called a "temporary suspension" rather than an "emergency expulsion." This is a semantic issue that is inherently tied to regulations unique to Washington State, and not worthy of Supreme Court review. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT WASHINGTON ADMINISTRATIVE CODE PROVISIONS

WAC 180-40-205 Definitions.

As used in this chapter the term: (1) "Discipline" shall mean all forms of corrective action or punishment other than suspension and expulsion and shall include the exclusion of a student from a class by a teacher or administrator for a period of time not exceeding the balance of the immediate class period: Provided, That the student is in the custody of a school district employee for the balance of such period. Discipline shall also mean the exclusion of a student from any other type of activity conducted by or in behalf of a school district. (2) "Suspension" shall mean a denial of attendance (other than for the balance of the immediate class period for "discipline" purposes) at any single subject or class, or at any full schedule of subjects or classes for a stated period of time. A suspension also may include a denial of admission to or entry upon real and personal property that is owned, leased, rented, or controlled by the school district. (3) "Short-term suspension" shall mean a suspension for any portion of a calendar day up to and not exceeding ten consecutive school days. (4) "Long-term suspension" shall mean a suspension which exceeds a "short-term suspension" as defined in subsection (3) of this section. (5) "Expulsion" shall mean a denial of attendance at any single subject or class or at any full schedule of subjects or classes for an indefinite period of time. An expulsion also may include a denial of admission to or entry upon real and personal property that is owned, leased,

rented, or controlled by the school district. (6) "School business day" shall mean any calendar day, exclusive of Saturdays, Sundays, and any federal and school holidays, upon which the office of the superintendent of the school district is open to the public for the conduct of business. A school business day shall be concluded or terminated upon the closure of said office for the calendar day.

WAC 180-40-245 Short-term suspension — Conditions and limitations.

A short-term suspension may be imposed upon a student for violation of school district rules adopted pursuant to WAC 180-40-225, subject to the following limitations or conditions, the prior informal conference procedures set forth in WAC 180-40-250, and the grievance procedures set forth in WAC 180-40-255: (1) The nature and circumstances of the violation must be considered and must reasonably warrant a short-term suspension and the length of the suspension imposed. This requirement does not preclude school districts (that is, the boards of directors of school districts) from establishing the nature and extent of the corrective actions and/or punishments which, as a general rule, must be imposed as a consequence of proscribed misconduct. Such advance notice to students is advisable, and the imposition of such preestablished corrective action and/or punishment is permissible as long as (a) disciplinarians and hearing officers are allowed to grant exceptions in

cases involving extenuating and/or exceptional circumstances, and (b) short-term suspension is not established as the corrective action or punishment for a student's first time offense other than for offenses involving exceptional misconduct as defined in subsection (2) of this section. (2) As a general rule, no student shall be suspended for a short term unless another form of corrective action or punishment reasonably calculated to modify his or her conduct has previously been imposed upon the student as a consequence of misconduct of the same nature. A school district may, however, elect to adopt rules providing for the immediate resort to short-term suspension in cases involving exceptional misconduct as long as disciplinarians and hearing officers may grant exceptions in cases involving extenuating and/or exceptional circumstances, notwithstanding the fact prior alternative corrective action or punishment has not been imposed upon the student(s)involved. For the purpose of this rule, "exceptional misconduct" means misconduct other than absenteeism which a school district has judged following consultation with an ad hoc citizens committee to (a) be of such frequent occurrence, notwithstanding past attempts of district personnel to control such misconduct through the use of other forms of corrective action and/or punishment, as to warrant an immediate resort to short-term suspension, and/or(b) be so serious in nature and/or so serious in terms of the disruptive effect upon the operation of the school(s) as to warrant an immediate resort to short-term suspension (for example,

misconduct judged by a school district to be the same or of the same nature as a violation of the state's drug or controlled substances laws). The ad hoc citizens committee required by this section shall be composed of three or more persons chosen by the school district or the administrative designee(s) of the district, and shall be constituted with the intent and purpose of representing various socio economic, minority and majority populations of the school district to the extent deemed practical. (3) No student subject to compulsory attendance pursuant to chapter 28A.225 RCW, as now or hereafter amended, shall be suspended by reason, in whole or part, of one or more unexcused absences unless the school district has first imposed an alternative corrective action or punishment reasonably calculated to modify his or her conduct and, in addition: (a) Provided notice to the student's parent(s) or guardian(s) or custodial parent(s) in writing in English or, if different, the primary language of the parent(s), guardian(s) or custodial parent(s) that the student has failed to attend school without valid justification, and by other means reasonably necessary to achieve notice of such fact; (b) Scheduled a conference or conferences with the parent(s) or guardian(s) or custodial parent(s) and the student at a time and place reasonably convenient to all persons included to analyze the causes for the student's absence, the analysis to determine by appropriate means whether the student should be made a focus of concern for placement in a special education or other special program designed for

his/her educational success; and (c) Taken steps to reduce the student's absence which include, where appropriate in the judgment of local school officials and where possible, discussed with the student, parent(s), guardian(s) or custodial parent(s), adjustments of the student's school program or school or course assignment or assisting the student or parent to obtain supplementary services that might ameliorate the cause(s) for the student's absence from school. (4) Kindergarten through grade four — No student in grades kindergarten through four shall be subject to short-term suspensions for more than a total of ten school days during any single semester or trimester as the case may be, and no loss of academic grades or credit shall be imposed by reason of the suspension of such a student. (5) Grade five and above program — No student in the grade five and above program shall be subjected to short-term suspensions for more than a total of fifteen school days during any single semester or ten school days during any single trimester, as the case may be. (6) Any student subject to a short-term suspension shall be provided the opportunity upon his or her return to makeup assignments and tests missed by reason of the short-term suspension if: (a) Such assignments or tests have a substantial effect upon the student's semester or trimester grade or grades, or (b) Failure to complete such assignments or tests would preclude the student from receiving credit for the course or courses. (7) Any student who has been suspended shall be allowed to make application for readmission at any time. Each school

district board of directors shall adopt written rules which provide for such an application for readmission and set forth the procedures to be followed.

WAC 180-40-250 Short-term suspension — Prior conference required — Notice to parent.

(1) Prior to the short-term suspension of any student a conference shall be conducted with the student as follows: (a) An oral or written notice of the alleged misconduct and violation(s) of school district rules shall be provided to the student, (b) An oral or written explanation of the evidence in support of the allegation(s) shall be provided to the student, (c) An oral or written explanation of the corrective action or punishment which may be imposed shall be provided to the student, and (d) The student shall be provided the opportunity to present his/her explanation. (2) In the event a short-term suspension is to exceed one calendar day the parent(s) or guardian(s) of the student shall be notified of the reason for the student's suspension and the duration of the suspension orally and/or by letter deposited in the United States mail as soon as reasonably possible. The notice shall also inform the parent or guardian of the right to an informal conference pursuant to WAC 180-40-255 and that the suspension may possibly be reduced as a result of such conference. (3) All short-term suspensions and the reasons therefor shall be reported in writing to the superintendent of the school district or his or her designee within twenty-four hours after the imposition of the suspension.

Appendix

WAC 180-40-260 Long-term suspension — Conditions and limitations.

A long-term suspension may be imposed upon a student for violation of school district rules adopted pursuant to WAC 180-40-225, subject to the following limitations or conditions and the notice requirements set forth in WAC 180-40-265 and the hearing requirements set forth in WAC 180-40-270: (1) The nature and circumstances of the violation must be considered and must reasonably warrant a long-term suspension and the length of the suspension imposed. This requirement does not preclude school districts (that is, the boards of directors of school districts) from establishing the nature and extent of the corrective actions and/or punishments which, as a general rule, must be imposed as a consequence of proscribed misconduct. Such advance notice to students is advisable, and the imposition of such preestablished corrective action and/or punishment is permissible as long as (a) disciplinarians and hearing officers are allowed to grant exceptions in cases involving extenuating and/or exceptional circumstances, and (b) long-term suspension is not established as the corrective action or punishment for a student's first time offense other than for offenses involving exceptional misconduct as defined in subsection (2) of this section. (2) As a general rule, no student shall be suspended for a long term unless another form of corrective action or punishment reasonably calculated to modify his or her conduct has previously been imposed upon the

student as a consequence of misconduct of the same nature. A school district may, however, elect to adopt rules providing for the immediate resort to long-term suspension in cases involving exceptional misconduct as long as disciplinarians and hearing officers are allowed to grant exceptions in cases involving extenuating and/or exceptional circumstances, notwithstanding the fact prior alternative corrective action or punishment has not been imposed upon the student(s) involved. For the purpose of this rule, "exceptional misconduct" means misconduct other than absenteeism which a school district has judged following consultation with an ad hoc citizens committee to (a) be of such frequent occurrence, notwithstanding past attempts of district personnel to control such misconduct through the use of other forms of corrective action and/or punishment, as to warrant an immediate resort to long-term suspension, and/or (b) be so serious in nature and/or so serious in terms of the disruptive effect upon the operation of the school(s) as to warrant an immediate resort to long-term suspension (for example, misconduct judged by a school district to be the same or of the same nature as a violation of the state's drug or controlled substances laws). The ad hoc citizens committee required by this section shall be composed of three or more persons chosen by the school district or the administrative designee(s) of the district, and shall be constituted with the intent and purpose of representing various socio economic, minority and majority populations of the school district to the extent deemed practical.

(3) No student subject to compulsory attendance pursuant to chapter 28A.225 RCW, as now or hereafter amended, shall be suspended by reason, in whole or part, of one or more unexcused absences unless the school district has first imposed an alternative corrective action or punishment reasonably calculated to modify his or her conduct and, in addition: (a) Provided notice to the student's parent(s) or guardian(s) or custodial parent(s) in writing in English or, if different, the primary language of the parent(s),guardian(s) or custodial parent(s) that the student has failed to attend school without valid justification, and by other means reasonably necessary to achieve notice of such fact; (b) Scheduled a conference or conferences with the parent(s) or guardian(s) or custodial parent(s) and the student at a time and place reasonably convenient to all persons included to analyze the causes for the student's absence, the analysis to determine by appropriate means whether the student should be made a focus of concern for placement in a special education or other special program designed for his/her educational success; and (c) Taken steps to reduce the student's absence which include, where appropriate in the judgment of local school officials and, where possible, discussed with the student, parent(s), guardian(s) or custodial parent(s), adjustments of the student's school program or school or course assignment or assisting the student or parent to obtain supplementary services that might ameliorate the cause(s)for the student's absence from school. (4) Kindergarten through grade

four — No student in grades kindergarten through four shall be subject to long-term suspension during any single semester or trimester, as the case may be, and no loss of academic grades or credit shall be imposed by reason of the suspension of such a student. (5) Grade five and above program — No single long-term suspension shall be imposed upon a student in the grade five and above program in a manner which causes the student to lose academic grades or credit for in excess of one semester or trimester, as the case may be, during the same school year. (6) Any student who has been suspended shall be allowed to make application for readmission at any time. Each school district board of directors shall adopt written rules which provide for such an application for readmission and set forth the procedures to be followed. (7) All long-term suspensions and the reasons therefor shall be reported in writing to the superintendent of the school district or his or her designee within twenty-four hours after the imposition of the suspension.

WAC 180-40-265 Long-term suspension — Notice of hearing — Waiver of hearing.

(1) Prior to the long-term suspension of a student, written notice of an opportunity for a hearing shall be delivered in person or by certified mail to the student and to his or her parent(s) or guardian(s). The notice shall: (a) Be provided in the predominant language of a student and/or a parent(s) or guardian(s) who predominantly speak a language other than

English, to the extent feasible, (b) Specify the alleged misconduct and the school district rule(s) alleged to have been violated, (c) Set forth the corrective action or punishment proposed, (d) Set forth the right of the student and/or his or her parent(s) or guardian(s) to a hearing for the purpose of contesting the allegation(s), and (e) Set forth the facts that: (i) A written (or "oral" if provided for by school district policy) request for a hearing must be received by the school district employee designated, or by his or her office, on or before the expiration of the third school business day after receipt of the notice of opportunity for a hearing, and (ii) If such a request is not received within the prescribed period of time, then the right to a hearing may be deemed to have been waived and the proposed long-term suspension may be imposed by the school district without any further opportunity for the student or his or her parent(s)or guardian(s) to contest the matter. A schedule of "school business days" potentially applicable to the exercise of such hearing right should be included with the notice. (2) The student and/or his or her parent(s) or guardian(s)shall reply to the notice of opportunity for a hearing and request a hearing within three school business days after the date of receipt of notice. A request for a hearing shall be provided to the school district employee specified in the notice of opportunity for a hearing, or to his or her office. A request for a hearing shall be accepted if in writing and may be accepted orally if expressly provided for and allowed by rule of the school district. (3) If a request for a hearing is not received

within the required three school business day period, the school district may deem the student and his or her parent(s) or guardian(s) to have waived the right to a hearing and the proposed long-term suspension may be imposed.

WAC 180-40-275 Expulsion — Conditions and limitations.

A student may be expelled for violation of school district rules adopted pursuant to WAC 180-40-225, subject to the following limitations or conditions, the notice requirements set forth in WAC 180-40-280, and the hearing requirements set forth in WAC 180-40-285: (1) The nature and circumstances of the violation must reasonably warrant the harshness of expulsion. (2) No student shall be expelled unless other forms of corrective action or punishment reasonably calculated to modify his or her conduct have failed or unless there is good reason to believe that other forms of corrective action or punishment would fail if employed. (3) In addition to the alternative corrective action requirement of subsection (2) of this section, no student subject to compulsory attendance pursuant to chapter 28A.225 RCW, as now or hereafter amended, shall be expelled by reason, in whole or part, of one or more unexcused absences unless the school district has also first: (a) Provided notice to the student's parent(s) or guardian(s) or custodial parent(s) in writing in English or, if different, the primary language of the parent(s), guardian(s) or custodial parent(s) that the student has failed to

attend school without valid justification, and by other means reasonably necessary to achieve notice of such fact; (b) Scheduled a conference or conferences with the parent(s) or guardian(s) or custodial parent(s) and the student at a time and place reasonably convenient to all persons included to analyze the causes for the student's absence, the analysis to determine by appropriate means whether the student should be made a focus of concern for placement in a special education or other special program designed for his/her educational success; and (c) Taken steps to reduce the student's absence which include, where appropriate in the judgment of local school officials and, where possible, discussed with the student, parent(s), guardian(s) or custodial parent(s), adjustments of the student's school program or school or course assignment or assisting the student or parent to obtain supplementary services that might ameliorate the cause(s) for the student's absence from school. (4) Once a student has been expelled in compliance with this chapter the expulsion shall be brought to the attention of appropriate local and state authorities including, but not limited to, juvenile authorities acting pursuant to chapter 13.04 RCW in order that such authorities may address the student's educational needs. (5) Any student who has been expelled shall be allowed to make application for readmission at any time. Each school district board of directors shall adopt written rules which provide for such an application for readmission and set forth the procedures to be followed. (6) All expulsions and the reasons

therefor shall be reported in writing to the superintendent of the school district or his or her designee within twenty-four hours after the imposition of the expulsion.

WAC 180-40-280 Expulsion — Notice of hearing — Waiver of hearing.

(1) Prior to the expulsion of a student, written notice of an opportunity for a hearing shall be delivered in person or by certified mail to the student and to his or her parent(s)or guardian(s). The notice shall: (a) Be provided in the predominant language of a student and/or a parent(s) or guardian(s) who predominantly speak a language other than English, to the extent feasible, (b) Specify the alleged misconduct and the school district rule(s) or policy alleged to have been violated, (c) Set forth the corrective action or punishment proposed, (d) Set forth the right of the student and/or his or her parent(s) or guardian(s) to a hearing for the purpose of contesting the allegation(s), and (e) Set forth the facts that: (i) A written (or "oral" if provided for by school district policy) request for a hearing must be received by the school district employee designated, or by his or her office, on or before the expiration of the third school business day after receipt of the notice of opportunity for a hearing, and (ii) If such a request is not received within the prescribed period of time, then the right to a hearing maybe deemed to have been waived and the proposed expulsion maybe imposed by the school

district without any further opportunity for the student or his or her parent(s) or guardian(s) to contest the matter. A schedule of "school business days" potentially applicable to the exercise of such hearing right should be included with the notice. (2) The student and/or his or her parent(s) or guardian(s)shall reply to the notice of opportunity for a hearing and request a hearing within three school business days after the date of receipt of the notice. A request for a hearing shall be provided to the school district employee specified in the notice of opportunity for a hearing, or to his or her office. A request for a hearing shall be accepted if in writing and may be accepted orally if expressly provided for and allowed by rule or policy of the school district. (3) If a request for a hearing is not received within the required three school business day period, the school district may deem the student and his or her parent(s) or guardian(s) to have waived the right to a hearing and the proposed expulsion may be imposed.

WAC 180-40-295 Emergency expulsion — Limitations.

Notwithstanding any other provision of this chapter, a student may be expelled immediately by a school district superintendent or a designee of the superintendent in emergency situations: Provided, That the superintendent or designee has good and sufficient reason to believe that the student's presence poses an immediate and continuing danger to the student, other students, or school personnel.

or an immediate and continuing threat of substantial disruption of the educational process. An emergency expulsion shall continue until rescinded by the superintendent or his or her designee, or until modified or reversed pursuant to the hearing provisions set forth in WAC 180-40-305 or the appeal provisions set forth in WAC 180-40-315.